IN THE

# Supreme Court of the United States

OCTOBER TERM, 1941.

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No. 34

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TEXTILE MILLS SECURITIES CORPORATION, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

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**On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.**

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## BRIEF FOR THE PETITIONER.

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### OPINIONS BELOW.

The opinions of the court below (R. 42-75) are reported in 117 Fed. (2d) 62.

### JURISDICTION.

A judgment of the court below was entered on December 7, 1940 (R. 75). A motion for judgment, filed by the petitioner, (R. 76-78) was denied on January 3, 1941 (R. 79). The petition for a Writ of Certiorari was filed on March 5, 1941 (R. 80). The petition for a Writ of Certiorari was granted March 31, 1941 (R. 80). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## GENERAL QUESTION PRESENTED.

Whether, in the determination of taxable net income, the American corporate-agent for former enemy-aliens whose property had been seized under the Trading With the Enemy Act, is entitled to deduction for the expenses incurred by the agent in procuring an Act of Congress which accorded a partial recognition of the claims of the former enemies, where the agent's contracts for the services required the agent to bear all expenses and provided that the agent would receive compensation (including reimbursement for the expenses) upon the basis of a contingent fee percentage relative to the amounts recovered by the former enemies as the result of such Act of Congress.

## SUBSIDIARY OR COLLATERAL QUESTIONS RESULT FROM COMMENTS BY OPINIONS IN THE COURT-BELOW.

1. Whether it was void or illegal for Americans to contract for the representation in the United States on behalf of former enemy-aliens in obtaining action by Congress for the recognition of claims by the aliens whose properties had been seized during the World War of 1914-1918 under the authority of the Trading with the Enemy Act, which Act specifically provided in part:

> "after the end of the war any claim of any enemy or an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.";

either because such legislation was "favor legislation" as distinct from "debt legislation", or because the contracts required compensation upon a contingent basis, or for any other reason.

2. If the contracts were void or illegal, whether the expenses incurred in an illegal business are deductible as "ordinary and necessary expenses" in the ascertainment of

taxable income, despite the illegality of the contracts and the business undertaking of representation of the claimants.

3. If the contracts were valid and if the business of the petitioner was legal, whether the deduction of the expenses as "ordinary and necessary expenses" is to be denied by reason of Article 262 of the Regulations 74 dealing specifically with the subject of "Donations by Corporations" and a reenactment of the provisions of the Revenue Act without change by Congress in the section of the Act according deduction for "ordinary and necessary expenses".

4. Whether a circuit court of appeals is authorized to sit and decide a case by a composition of judges comprising a greater number than the three judges prescribed by the Judicial Code, Section 117, and where different views have been expressed by several groups of judges within a total of judges exceeding the prescribed three-judges, which views shall prevail as the judgment of a circuit court of appeals.

5. If a circuit court of appeals is authorized to decide a case by a court *en banc* whose composition exceeds the three-judges prescribed by the Judicial Code, what is the proper composition of a court *en banc* in a Judicial Circuit under the Federal statutes, and is the Circuit Justice an essential member of such a court.

6. Where the Rules of the Third Judicial Circuit prescribe that two judges shall constitute a quorum when the judges sit as a court *en banc* and, in the case at bar, two such quorums have expressed contrary conclusions in the case, which views shall prevail as expressing a judgment of the court.

7. Whether a circuit court of appeals, by an enlargement into a court *en banc* of five judges, has the right by a majority of three judges to reverse a Board decision for reasons and upon issues which were not presented in the Board proceedings.

## STATUTES AND REGULATIONS INVOLVED.

*Revenue Act of 1928, Section 23,* Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

> (a) EXPENSES.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

*Regulations 74.*

Article 121 (at page 34):

> BUSINESS Expenses. Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under the provisions of articles 141-271. * * * Among the items included in business expenses are management expenses, commissions, labor, supplies, incidental repairs, operating expenses of automobiles used in the trade or business. * * * A taxpayer is entitled to deduct the necessary expenses paid in carrying on his business from his gross income from whatever source. As to items not deductible, see section 24 and articles 281-284.

*Revenue Act of 1928, Section 23,* Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

> * * * (n) CHARITABLE AND OTHER CONTRIBUTIONS.—In the case of an *individual*, contributions or gifts made within the taxable year to or for the use of. * * * (Italics added)

*Regulations 74.*

Article 261. *Contributions or gifts by individuals* (at page 35)

. . . . . .

Article 262. Donations by corporationos. (at page 86)

Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under section 23(n). Donations made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependants are a proper deduction as ordinary and necessary expenses. Donations which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income. For example, a street railway corporation may donate a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars. Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.

*Judicial Code Section 117.* (U. S. Code Annotated, Title 28, Sec. 212)

There shall be in each circuit a circuit court of appeals which shall consist of three judges, of whom two shall constitute a quorum, which shall be a court of record, with appellate jurisdiction, as hereinafter limited and established.

*Judicial Code, Section 118.* (U. S. Code Annotated, Title 28, Sec. 213)

* * * The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it

shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law. * * *

*Judicial Code, Section 120.* (U. S. Code Annotated, Title 28, Sec. 216)

The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits. * * * In case the full court at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, one or more district judges within the circuit shall sit in the court according to such order or provision among the district judges as either by general or particular assignments shall be designated by the court. * * *

## STATEMENT.

### 1. Facts Regarding the Merits of the Case.

The petitioner was obligated by contracts (R. 29-34) to represent in the United States foreign claimants comprising former enemy-aliens whose properties had been seized under the authority of the Trading with the Enemy Act of 1917,

"to protect the interest of the Claimant in moneys and or securities or properties now held in trust for the Claimant by the Alien Property Custodian, and to bring about the return of the Claimant's property* * *" (R. 33)

The contracts were entered into in Germany in the individual name of the president of the petitioner corporation and later were assigned to the company. (R. 34)

The contracts required "the Agent * * * to meet all costs and expenses incurred in the performance of his agency". (R. 33)

The compensation to the Agent was fixed at a percentage basis relative to the amount of recovery by the claimants

(R. 33), 3 per cent upon the amount received by the claimant at any time and an additional 2 per cent upon "the amounts actually paid to the Claimant within one year after enactment of such legislation". (R. 33)

It was agreed by both litigants in the Board proceedings by a Stipulation of Facts (R. 30-31; 34-36);

> "The obligations of the petitioner under the aforesaid representation contracts were such as *necessitated* the conduct by the petitioner of an extensive educational campaign, the object of which was to acquaint and impress upon the American people and their representatives in Congress, the justice of the claims of the petitioner's principals. Such a campaign was conducted by the petitioner at its own expense. The carrying on of this campaign involved the gathering and dissemination of historical data and precedents in respect of the policy of the United States relative to enemy-owned properties within its borders in times of war, international relations, treaty rights, etc., as well as the preparation and making of appropriate proposals and suggestions to Members of Congress, with the view to the expeditious enactment of the sought-for legislation. For these purposes the petitioner engaged the services of various persons and organizations, including Ivy Lee, W. F. Martin, J. Reuben Clark, . . . The services of the "Ivy Lee" organization were utilized in connection with matters of publicity; including the making of arrangements for speeches and speakers around the country, cooperating with the Press in editorial comments, as well as news items, and work of a general publicity nature. The services of W. F. Martin and J. Reuben Clark were utilized in connection with the preparation of propaganda concerning international relations, treaty rights, and the historical policy of the United States relative to enemy-owned property in times of war. Their views on these subjects were expressed in several publications; one during the year 1926, which was presented to the Senate by a Member of that Body, entitled "American Policy Relative to Alien Enemy Property," which was published as Senate Document No. 181, Sixty-ninth Congress, Second Session, a true and correct copy of which is attached hereto and made a part hereof as Ex-

hibit "B"; another, entitled "Status of Ex-enemy Property, Interpretation of Treaties and Constitution," being a forty-three page pamphlet, which was widely distributed through the facilities of "Ivy Lee," and otherwise, a true and correct copy of which is attached hereto and made a part hereof, as Exhibit "C," . . . Messrs. Lee, Martin, Clark . . . continued their respective services, as hereinabove described, to the petitioner until the enactment of the "Settlement of War Claims Act of 1928," on March 10, 1928 . . . The objective of the educational campaign so carried on by the petitioner was accomplished by the passage of the "Settlement of War Claims Act of 1928," supra, subsequent to which no services were rendered to the petitioner by Messrs. Lee, Martin, and Clark." (Italics added.)

In its Opinion, the Board stated (R. 14):

". . . the stipulation is adopted as our findings herein. We shall set forth so much of the facts as is considered necessary for discussion of the issue to be determined."

The Board also stated (R. 18):

"He (*the Commissioner*) makes no claim that the acceptance of employment such as is involved in this proceeding was not within the scope of petitioner's powers or business. Neither does he make any claim that the expenses incurred were not in fact ordinary and necessary in performing the services required of it under its contracts." ( Italicized explanation added.)

The Board concluded (R. 21, 22):

"The respondent has made no claim, as we have pointed out, that such employment was outside the scope of petitioner's powers or business and we have concluded from the record that the services rendered were necessary for the accomplishment of the desired result. There has been no showing that the petitioner indulged in any questionable practices in carrying out the purposes of its employment and no showing or claim that the activities in respect of which the ex-

penses were incurred were against public policy . . . Accordingly we are unable to reach any conclusion except that the expenses here in question were in fact 'ordinary and necessary' in the conduct of petitioner's business and, having reached that conclusion, it is our opinion that the statute directs their allowance as deductions in determining petitioner's net income . . ."

The opinion of Judge Maris (R. 66-75) concurred in by Judge Goodrich, agreed with the Board.

So far as a unity of views can be found in the two opinions of the three other judges who held against the petitioner in the court below, the facts found by the Board were disregarded and the conclusion for reversal of the Board decision was reached by injecting into the case issues that neither were argued nor were even suggested in the Board proceeding, and which definitely were excluded from the Board proceedings by a Stipulation of Facts and the Commissioner's actions through his legal representatives.

### 2. Facts Regarding Procedure.

The litigation was initiated by Notice of Deficiency (R. 2-11) from the Commissioner and the statement therein (R. 11):

> "The amounts of $96,000.[1] and $47,500. representing sums spent for the promotion of legislation are not deductible from gross income in accordance with article 262 of Regulations 74 promulgated under the Revenue Act of 1928 and section 43[2] of the same Act."

The Commissioner's determination was reviewed by the Board of Tax Appeals, the evidence comprising the Petition so far as admitted by Answer and a Stipulation of Facts (R. 29-38). The decision of the Board held that there

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[1] By Stipulation (R. 35, 36) the Commissioner later admitted that $51,000 of that $96,000 was allowable as deduction.

[2] Reference to section 43 later became inapplicable because the Commissioner conceded that the items of $45,000 and $47,500 were properly accrued. (R. 38.)

was no deficiency (R. 23), because the expenses were deductible as ordinary and necessary expenses. The opinion of the Board is found in R. 13-22, and in 38 B. T. A. 623.

The Commissioner filed a Petition for Review (R. 23-27) with the Circuit Court of Appeals for the Third Circuit, on February 13, 1939 (R. 23).

Effective March 1, 1940, the judges of the Third Circuit amended the Rules of that Circuit (R. 74). Rules 4 and 5 made provision for consideration and hearings by "the court en banc" (R. 50, 51).

After an original argument before a court of three judges (R. 41), the reargument of this case was ordered "before the court en banc" (R. 41). That argument occurred July 1, 1940, before the five circuit judges of the Third Judicial Circuit, Biggs, Maris, Clark, Jones, and Goodrich (R. 42).

Three opinions were rendered December 7, 1940; one by Judge Biggs concurred in by Judge Jones (R. 42-58), a separate opinion by Judge Clark (R. 58-66), and one by Judge Maris concurred in by Judge Goodrich (R. 66-75).

A judgment bears date December 7, 1940, over the signature of John Biggs, Jr, Circuit Judge (R. 75) ordering:

> "that the decision of the said Board of Tax Appeals in this cause be, and the same is hereby reversed, and the cause is remanded to the said Board of Tax Appeals with the direction to redetermine the tax in accordance with the view expressed by the majority of this court."

On December 27, 1940, the respondent below (the petitioner herein) filed a Motion for Judgment, addressed to a circuit court of appeals comprising Judges Maris and Goodrich as a quorum of two judges in a circuit court of appeals as prescribed by Section 117[3] of the Judicial Code (R. 76-78). That Motion was denied January 3, 1941 (R. 79).

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[3] Judicial Code, Section 117. "There shall be in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum. . ."

## SPECIFICATION OF ERRORS URGED.

1. A circuit court of appeals comprising Judges Maris and Goodrich as a quorum of two judges in a court of three judges specified by Judicial Code, Section 117, erred in refusing to order an entry of judgment of affirmance of the Board decision, as demanded by petitioner's Motion for Judgment.

2. The judgment of reversal of the Board decision is invalid because rendered as the action by a majority of five judges, instead of by a court of three judges as specifically provided by the Judicial Code, Section 117 and by the other pertinent provisions of that Code.

3. The alleged court en banc was illegally constituted, since it did not include within its membership the Associate Justice who was assigned as a Circuit Justice to the Third Judicial Circuit, nor the Chief Justice, nor a District Judge of the Circuit.

4. The circuit judges of the Third Judicial Circuit erred in holding and deciding that those judges, to the exclusion of the Circuit Justice holding assignment to that judicial circuit, the Chief Justice or a District Judge, can sit and decide a case as a "court en banc" in a situation (such as in the case at bar) where decisions within that circuit do not stand in a state of conflict and where the decision in the specific case would not stand in conflict with any prior decision within that circuit.

5. The Rule 4 of the Third Judicial Circuit, by authority of which the five judges purported to decide the case at bar by a majority of three judges to two judges, violates Article III, Section 1, of the Constitution of the United States, for the reason that a five-men court is not a part of "such inferior Courts as the Congress may from time to time ordain and establish", and to the contrary the Congress has prescribed a circuit court of appeals as a three-men court.

6. Any set up of five judges into a validly constituted circuit court of appeals of three members wherein any two of Judges Biggs, Clark, and Jones comprised a quorum of two judges, erred in holding and deciding that, collectively or alternatively:

(a) Petitioner's contracts were invalid or void as being against public policy.

(b) The facts as agreed upon between the parties and as found to be the facts by the Board, can be disregarded as the facts, and an adverse decision be rendered upon a different assumption of the facts, as made by such a quorum of judges.

(c) Petitioner's contracts or services sought the enactment of "favor legislation", as distinct from "debt legislation".

(d) The Trading With The Enemy Act did not in itself create "debt legislation".

(e) The Settlement of War Claims Act of 1928 was not in settlement of claims that Congress recognized to be existent by the expressed provisions of the Trading With The Enemy Act.

(f) The petitioner's expenses were not ordinary and necessary expenses within the construction of the Revenue Act of 1928.

(g) There is a conclusive and unrebuttable presumption of law that every contract requiring the performance of services for the procurement of "favor legislation" is improper, inferentially fraudulent or wrongful, and basically void as being against public policy, regardless of the contrary statement by the Board that no such issue was presented in the case before the Board.

(h) The opinion of Judge Maris, concurred in by Judge Goodrich, did not express the correct legal principles as the basis for a judgment affirming the Board decision.

(i) The circuit court of appeals can depart from the accepted and usual course of judicial proceedings, by reversing the Board on an issue that was not raised in the Board and wherein the advancing of the issue by the respondent for the first time within a circuit court of appeals represents a shift to a ground which the taxpayer had every reason to think was abandoned in the earlier stage of the litigation when before the Board.

(j) The cause should be remanded to the Board with the direction to redetermine the tax in accordance with the view expressed by the majority, and without according the petitioner any opportunity for the presentation of additional evidence material to the new issue first raised by the court itself in the opinions of Judges Biggs and Clark.

(k) That Congress, by the reenactment of the revenue-laws without change in the language for deduction of "ordinary and necessary expenses", is to be presumed as having approved Article 562 of Regulations 69 (dealing with the subject "Donations by Corporations"), just as if that Article had been incorporated into Article 101 (which dealt specifically with "ordinary and necessary expenses"), although neither Article made the slightest specific reference to the other Article, and further, that Congress is to be presumed by such reenactment to have given its approval to an interpretation which the Bureau, for the first time, makes *in the very case at bar.*

(l) The ordering of a judgment of reversal of the decision of the Board of Tax Appeals.

7. If the court of five judges constitutes a validly composed circuit court of appeals for the Third Circuit, the court erred in holding and deciding relative to all of the grounds set forth herein under subdivision 6, (a) to (l) inclusive.

8. Although no statute or law enacted by Congress prohibited any of the actions engaged in by the petitioner in

performance of its contract obligations, the holding by Judges Biggs, Jones and Clark, converts without authority of law, the revenue-laws into a penal statute imposing a fine levied upon the petitioner's gross receipts because the petitioner engaged in a valid, legal, and unprohibited business undertaking which those judges personally did not favor, the holding in that regard constituting unconstitutional judicial legislation as an unauthorized assumption of the powers conferred by the Constitution upon the Congress.

## SUMMARY OF THE ARGUMENT.

The petitioner was engaged in the business of representing foreign principals in obtaining the restoration by an Act of Congress, of property seized under the Trading with the Enemy Act. The expenses in question were sustained in that business. The business was legitimate and proper. The undertaking was legal. Nothing unconscionable or improper was done. The disallowance of deduction as "ordinary and necessary expenses" finds no justification from the mere fact that the business involved the procurement of an Act of Congress under the peculiar facts of this most exceptional case, including the necessity for contingent compensation.

The legal conclusions expressed by the Board (R. 17-22) and by a quorum of two judges (Maris and Goodrich) in the Circuit Court of Appeals for the Third Judicial Circuit (R. 66-75), merit the approval by this Honorable Court through the appropriate judgment in favor of the petitioner or, if additional evidence is deemed essential to the ends of Justice, the proceeding should be remanded to the Board for a rehearing.

## ARGUMENT.

### Part 1. The Issue Before the Board.

### I.

**A majority of three judges in the court-en-banc, affirmed the board on the only issue presented to the board, but a different majority of three judges reversed the board upon issues which were not presented to the board.**

Prejudice to the petitioner by the consideration of the case by a court *en banc*, instead of by the three judges specified in the Judicial Code, comes not from a court *en banc* as such, but from the fact that three out of the five judges saw fit to join in an adverse decision upon issues that were not presented in the Board proceedings and by a disregard of the facts as found by the Board.

The three opinions in the court-below show, that one of those three adverse-judges (Judge Clark) actually agreed with the two dissenting-judges relative to the single issue that was presented to and was decided by the Board, thus evidencing that if the court *en banc* properly had confined its consideration to a review of the issue that was presented to the Board, the judgment would have affirmed the Board decision.

In that event, the Government would have borne the burden of a petition for certiorari and, when granted, the same single issue would stand for consideration by this Court as was decided by the Board.

As matters now stand, however, this petitioner is obliged to maintain the burden and to argue issues additional to that in the Board proceeding.

The issue before the Board was clearly defined.

By Section 23(a) of the Revenue Act of 1928, Congress accorded a deduction from the gross receipts in the ascertainment of taxable net income, for:

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, *including a reasonable allowance for salaries or other compensation for personal services actually rendered.*" (Italics added)

The items in dispute in this case constituted "other compensation for personal services actually rendered," and were of no other nature as "ordinary and necessary expenses." The reasonableness of the amounts never were questioned by the Commissioner throughout the controversy, nor did he ever contend that the personal services were not actually rendered. As the italicized words are explanatory of "ordinary and necessary expenses," definitely expressing the thought that "compensation for personal services actually rendered" is "ordinary and necessary expenses" to the extent of reasonableness in amounts, a failure by the Commissioner to question either the amounts or the rendition of the services, would appear necessarily to admit the expense as being of the nature "ordinary and necessary."

When the case was heard by the Board the issue was a simple one. It finds statement in the Commissioner's notice of deficiency (R. 11):

> "The amounts of ($45,000.)[1] and $47,500. representing sums spent for the promotion of legislation are not deductible from gross income in accordance with Article 262 of Regulations 74 promulgated under the Revenue Act of 1928 . . . "[2]

In addition to the fact that the Commissioner never questioned in the Board proceedings the reasonableness of the amounts, the rendition of the services, or the nature of the expenses as being incurred as "ordinary and necessary

[1] Reduced from $96,000 stated in the notice, by the Commissioner's admission in the Stipulation of Facts.

[2] Language omitted, also covered by the Stipulation of Facts.

expenses" in carrying on the taxpayer's business, the Commissioner agreed with us by the Stipulation of Facts:

> "The obligations of the petitioner under the aforesaid representation contracts were such as *necessitated* the conduct by the petitioner of an extensive educational campaign, the object of which was to acquaint and impress upon the American people and their representatives in Congress, the justice of the claims of the petitioner's principals." (R. 30.) (Italics added.)

Parenthetically, we direct attention to that word "necessitated," in view of statement in the opinion of Judge Biggs that we "failed to prove" that the services were "necessary." The facts as agreed-to, must have escaped the Judge's attention. We continue quotation from the Stipulation:

> "Such a campaign was conducted by the petitioner at its own expense. The carrying on of this campaign involved the gathering and dissemination of historical data and precedents in respect of the policy of the United States relative to enemy-owned properties within its borders in times of war, international relations, treaty rights, etc., as well as the preparation and making of appropriate proposals and suggestions to Members of Congress, with a view to the expeditious enactment of the sought-for legislation." (R. 30, 31)
>
> "For these purposes the petitioner engaged the services of various persons and organizations . . . " (R. 31) —(the Stipulation naming the three persons related to the items in dispute).
>
> "The objective of the educational campaign so carried on by the petitioner was accomplished by the passage of the "Settlement of War Claims Act of 1928" . . ." (R. 34)

Again parenthetically,—yet, says the opinion of Judge Biggs, we failed also to prove a proximate causation between the services and the legislation. The Stipulation ap-

pears to have been overlooked in every respect. We resume quotation from the Stipulation:

> "The parties hereto agree that these . . . obligations so incurred . . . represent expenses incurred by the petitioner directly in connection with the campaign carried on by it, as aforesaid, the purpose of which was accomplished by the enactment by Congress of the 'Settlement of War Claims Act of 1928,' as aforesaid." (R.36)

Truly, and correctly, we did not include in the Stipulation the entire history of the Trading with the Enemy Act, nor of the several Acts which accorded gradual restitutions to the enemies, nor of the Settlement of War Claims Act which related to the properties that then remained; nor did we go into extensive detail by agreeing that the American-claimants against Germany were seeking satisfaction for *their* claims by urging upon Congress the confiscation of the properties that had been seized from the enemies and still remained, and that their propaganda for confiscation had to be met by honest and true statements on our part in protection of our principals' rights or claims; nor did we explain why the contingent-contracts were the only way that the thing could be handled.

The Stipulation covered *the issue that was before the Board*, and was confined to the facts that were essential for the understanding of that issue.

The Board found the facts as stated in the Stipulation (R. 14).

The sole and only issue before the Board related to the single question whether the Article 262 of Regulations 74 precluded the deduction of these expenses that were admittedly "ordinary and necessary expenses."

The Board so stated the matter in the Opinion (R. 17, 18):

> "In his notice of deficiency the respondent rested his disallowance of the deductions here in issue on the provisions of article 262 of Regulations 74, which states

> in part that 'Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income.' He makes no claim that the acceptance of employment such as is involved in this proceeding was not within the scope of petitioner's powers or business. *Neither does he make any claim that the expenses incurred were not in fact ordinary and necessary in performing the services required of it under its contract.* He now rests his claim wholly upon the decision of the United States Circuit Court of Appeals for the Ninth Circuit in *Sunset Scavenger Co.* v. *Commissioner*, 84 Fed. (2d) 453, which reversed the Board and approved the regulation cited. At the hearing his counsel stated that 'the question in one sentence is whether the Board will follow that decision or whether it won't.' " (Italics of opinion, added).

Before the Board the question was "in one sentence," —relating wholly to the Article in the Regulations. When the case gets through a court *en banc*, the "one sentence" has carried into the whole field of jurisprudence, ethics, morality, crime, public policy,—even to the extent of interpreting the congressional-intent of the 1928-Congress by the presumed intentions of a different Congress of 1936, or *eight years* after the event.

When a case is presented to the Board upon such a narrow and clear-cut issue, it hardly can be expected that either party will encumber the record by a lot of extraneous material that holds no relation to that issue.

So far as the Commissioner was concerned, he was relying wholly upon the Article 262 and it made no difference what was done or how it was done. So far as he was concerned, our motives and actions could be beyond reproach or criticism; the expenses could be "ordinary and necessary expenses" and still be non-deductible because of the Article 262. We *were seeking legislation*, and that Article 262 stood as "the supreme law of the land," to deny the

deduction of our expenses. That, was the Commissioner's position before the Board. For our part, we contended that the Article did not apply to the facts of our situation anyway; further, that the Commissioner's interpretation of the Article was incorrect; we distinguished our situation from the *Sunset Scavenger* case (supra) and contended that, if applicable to our situation, the decision was bad law.

Of course, we were "seeking legislation." That was our very business, the thing for which we had been engaged. We had not the slightest desire for any concealment. If our commissions (which included reimbursement for our expenses) were income, we had no element of gain or profit except as our receipts exceeded the expenses.

The Board rendered its decision in our favor, holding that the Article 262 did not bar the deductions, closing the Opinion as follows:

> "The respondent has made no claim, as we have pointed out, that such employment was outside the scope of petitioner's powers or business and we have concluded from the record that the services rendered were necessary for the accomplishment of the desired result. There has been no showing that the petitioner indulged in any questionable practices in carrying out the purposes of its employment and no showing or claim that the activities in respect of which the expenses were incurred were against public policy . . . Accordingly we are unable to reach any conclusion except that the expenses here in question were in fact 'ordinary and necessary' in the conduct of petitioner's business and, having reached that conclusion, it is our opinion that the statute directs their allowance as deductions in determining petitioner's net income . . ." (R. 21, 22)

That the sole issue related to the Article 262 further finds a confirmation in the dissenting opinion of three of the members of the Board (R. 22). It was their view that Article 262 controlled the matter, and their entire opinion relates to the Article 262.

If the Commissioner believed that anything was lacking in the record before the Board or in the statements by the

Board opinion, he could have filed a motion for rehearing. He did not do so (R. 1, 2). Instead, he carried the case upon the Board-record, by a petition for review to the Third Circuit. If the Commissioner had seen fit to raise new issues at a rehearing (as Judges Biggs and Clark did in their opinions), the taxpayer stood fully prepared to meet any and all such new issues.

The element that appears particularly to have disturbed those two judges was the fact that the contracts were contingent. There was an entirely valid reason for the contingent-fee arrangement. The devaluation of the German-Mark had destroyed most values in Germany, insomuch that the claimants possessed no resources out of which to pay for our services, except the property in control of the Alien Property Custodian. Similar properties seized in England, France, and Italy, suffered confiscation by the terms of the Treaty of Versailles. Restrictions by laws in Germany precluded the transfer of money out of Germany, even if the claimants had possessed resources in their native country. For the same reasons, we had to advance the expenses for them, looking for our reimbursement of those expenses by a higher rate of contingent-fee, than if the circumstances had permitted direct payment of the expenses by the Germans themselves.

The very same thing that caused the American-claimants to seek from Congress the confiscation of the properties of German-nationals that stood in possession of the Alien Property Custodian, in satisfaction of their claims, was the cause of our contingent contracts,—namely, the financial collapse of Germany. That collapse prevented the payment of reparations by Germany and the performance of other obligations under the Treaty of Versailles and the Treaty of Berlin, including payment of the claims of Americans whose properties had been seized in Germany and who had suffered losses by the sinking of the Lusitania and otherwise.

The Settlement of War Claims Act of 1928 solved the problem relative to claims of Americans and Germans alike, without confiscation and by way of compromise between the respective claimants. We will cover that matter later in this brief. (Pages 53 to 76 herein)

Yet, without the slightest basis for the statements, and with a wholly silent Record in that regard, the two adverse opinions in the Third Circuit pin upon us "a sinister element" (R. 60) and an *ipso facto* illegality (R. 45), in the fact that the circumstances compelled our engagement by a contingent-fee contract arrangement,—without, moreover, according us the slightest chance for explaining "why." The situation held its own peculiar facts and, much as we might have preferred it, no different kind of arrangement was possible.

Even solvent clients sometimes insist upon contingent-fee contracts with their attorneys. Relative to the claimants whom we represented, there was no other choice, and whoever might represent them had to do so by that form of contract alone.

With reference to the single issue presented to the Board, the three opinions in the Third Circuit evidence that Judges Clark (R. 64, 65), Maris and Goodrich (R. 72-75), constitute a majority of a court *en banc* (unanimous as a court of three judges) in agreeing with the Board that the Article 262 does not preclude the deduction of the expenses in question, while a minority of two judges (Biggs and Jones) agreed with the dissenting members of the Board (R. 48, 49, 50).

Thus, it may be observed, that if the original court of three judges (Biggs, Clark, and Maris) had confined the issue to the only question presented to and decided by the Board, the decision would have affirmed the Board in favor of the taxpayer by a quorum comprising Judges Clark and Maris. However, by invoking the addition of two judges into the court and a resort to new issues which never were presented to the Board, we find the confusing result of the

three opinions and an adverse majority relative to those new issues.

We contemplate with juridical anxiety the chaos to Justice, if courts *en banc* are approved for circuits comprising six and seven judges, with majority decisions rendered relative to issues that were not presented in the trial courts.

But the judgment of reversal by the majority of the three judges in the court below, stands upon those extraneous issues and, by necessity, we must meet them because we deem the entire record as being before this Court by the granting of the Writ of Certiorari.

With all fairness to the judges of the Third Circuit, we state that the new issues were initiated into the case by the Commissioner's attorney in the appellate proceedings, an attorney who held no connection with the matter when it stood within the Board's jurisdiction.

We noted our objection to that procedure through our brief, by insisting that the argument should be confined to the issue which the Board decided, and we did not argue those new issues in the appellate court. By a statement in our brief, that statement being preliminary to our Argument and separately marked by a heading, we stated in part:

> "The injection of this 'new issue,' we believe, results from the fact that the individuals who have prepared the brief on this appeal by the Commissioner, are entirely different persons from those who actually participated in the Board proceedings *and who knew what was the issue before the Board.*
>
> That a new question which was not raised before the Board, cannot be injected for the first time upon an appeal, would appear to have been decided conclusively:
>
> *General Utilities & Operating Co.* v. *Helvering*, 296 U. S. 200.
> *Helvering* v. *Savage*, 297 U. S. 106.
> *Kotteman* v. *Commissioner*, 81 Fed. (2d) 621.

*Botchford* v. *Commissioner*, 81 Fed. (2d) 914.
*Helvering* v. *Montana Life Insurance Co.*, 84 Fed. (2d) 623.
*Sabatini* v. *Commissioner*, 98 Fed. (2d) 753.
*Bagnall* v. *Commissioner*, 96 Fed. (2d) 956.
*Covington* v. *Commissioner*, 103 Fed. (2d) 201.

Regardless of that well-settled principle, this Court readily will observe, that the expenses incurred in *procuring* an Act of Congress under a contract that required the services of procuring such an Act and which stated in effect that the expected commissions must reimburse for the expenses which the agent incurred, essentially must bear the characterization of being "ordinary"—according to every definition of that word.

Beyond the foregoing statement, we perceive no necessity for our further discussion of that phase of the brief on behalf of the Commissioner."

For the most recent discussion of the subject-matter of "new issues," with a possible application to the case at bar, we refer this Honorable Court to its opinion in *Hormel* v. *Helvering*, 312 U. S. 552.

We desire to make our position clear. The Record in the Board and transferred to the Circuit Court, was clear, by the Stipulation, the Board opinion, and the Commissioner's acceptance of the Board's statements by a failure to file motion for a rehearing. If the Commissioner desired to change the issue in the case, that should have been done in the Board proceedings. But, delaying until the appeal brought a record into the appellate court that contained none of the detailed evidence that would have been presented in the Board, except for the Commissioner's agreement by Stipulation and acceptance of the Board's statements by failure to move for a rehearing, constituted a trial *de novo* in the appellate court in the absence of an adequate record.

The Stipulation was the result by way of an agreement after many oral conferences with the Commissioner's at

torney. In those conferences "the cards were laid on the table face up", and only the single question regarding Article 262 was the Commissioner's choice as the matter to be reviewed by the Board. The Board states in its opinion that attorney's statement at the oral argument:

> "the question in one sentence is whether the Board will follow that decision or whether it won't." (R. 18)

About *four years' time* was required from the start to the finish in the enactment of the Settlement of War Claims Act. Detailed evidence regarding what we did and the reasons therefore, would have necessitated a day-by-day account of what we did and of what many other persons did as the cause for our actions. Several hearings were held in the House and the Senate. Many bills were introduced. The history of everything that happened in Congress would have been required. All of that was unnecessary in the Board because the Commissioner confined the question to a single issue. Obviously, what was *not required* in the Board, did not stand in the Record before the Third Circuit.

We refused to argue those "new issues" in the Third Circuit, solely because the record before that court established an entirely different issue,—namely, the issue which was presented to the Board.

Three judges agreed with us and with the Board regarding the only issue that properly stood before the Third Circuit. Three judges agreed against us regarding the "new issues" that had not been presented to the Board. One judge (Judge Clark) constituted the third judge in the instance of each of the two majorities as a court *en banc*.

We deem that the main question before this Court is the same question as was decided by the Board, affirmed by three judges in the court-below,—namely, whether Article 262 bars the deduction of the expenses in question.

## II.

## Article 262 of Regulations 74 does not apply to the facts of this case.

*A.—Analysis and Comments Regarding Commissioner's Contention.*

The Commissioner contended in the Board and the Third Circuit, that "the reenactment rule" barred the deduction, and he relies upon Article 262 of Regulations 74.

The petitioner answers that contention:

1. The Commissioner's *true* contention is not for the application of "the reenactment rule", but for a *present construction* of the Article 262 which it is unreasonable to presume as being within the knowledge of Congress when enacting the Revenue Act of 1928.

2. The Commissioner's attempt to extend "the reenactment rule" to the facts of this case, merits a reconsideration of that rule and its repudiation by this Honorable Court.

3. The Article 262, in any sense of an approval by Congress, has reference to gifts or donations, and not to the kinds of business expenses involved in the case at bar.

Article 262 in Regulations 74, is in the same language as Article 562 of Regulations 69; the latter applied to the Revenue Act of 1926 and the former to the Revenue Act of 1928. The language of deduction for "ordinary and necessary expenses" was repeated in the 1928-Act similarly as in the 1926-Act. Relative to the 1926-Act, the Treasury gave an interpretation of "ordinary and necessary expenses" by Articles 101 to 112 of Regulations 69, and the Article 562 dealt with the subject of corporate *Donations;* relative to the 1928-Act, the Treasury gave an interpretation of "ordinary and necessary expenses" by Articles 121 to 132 of Regulations 74 (thus specifically construing Sec-

tion 23(a) of the 1928-Act, and quoting that subdivision (a) as a heading that preceded the Articles 121 to 132); fifty-one pages further-over in Regulations 74, the Treasury specifically interprets subdivision (n) of Section 23 of the 1928-Act, dealing with the subject "Charitable and other contributions", and covers the matter of interpretation by Article 261 as "Contributions or gifts by individuals" and by Article 262 as "Donations by corporations".

Now, declares the Commissioner,—when the 70th Congress repeated in the Revenue Act of 1928 the language of deduction for "ordinary and necessary expenses" similarly as was stated in the Revenue Act of 1926, the 435 Representatives and the 96 Senators and the President should have known that, when the Regulations covered "Donations" by corporations the Treasury meant "ordinary and necessary expenses" that were *not gifts or donations*,—even though in no place in the Regulations (74 or preceding) can there be found any interpretation of "ordinary and necessary expenses" in terms of denying deductions to individuals, partnerships, and trusts that were engaged in business, for expenses involving the "promotion or defeat of legislation", either as expenses *or donations*.

On behalf of the petitioner we assert, that those members of the 70th Congress are to be imputed with *no less* knowledge of the Regulations 69 (when repeating language in the 1928-Act), than the Treasury itself demonstrated when it compiled and promulgated the Regulations 74 as being applicable to the legislation which that 70th Congress so innocently had enacted.

The Article 121 of Regulations 74 bears the specific heading "Business expenses"; there is no cross-reference to Article 262; in fact, Article 121 closes with the statement,—"As to items not deductible, see section 24 and articles 281-284." Similarly, Article 561 of Regulations 69 dealt with corporate deductions, stating:

> "In general the deductions from gross income allowed corporations are the same as allowed individuals, ex-

> cept that corporations may deduct dividends as provided in paragraph (6) of section 234 (a) and *may not deduct contributions or gifts*. Particularly, as to business expenses, see articles 101-112 . . ." (Italics added)

Then follows in Regulations 69 the Article 562 on the stated subject of "Donations", opening with the statement:

> "Corporations are not entitled to deduct from gross income contributions or gifts which individuals may deduct under paragraph (10) of section 214 (a)."

Following that statement in Article 562, are three sentences, each dealing with specific kinds of corporate-*donations* which are considered deductible because they are treated as "business expenses".

We quote those sentences;

> "*Donations* made by a corporation for purposes connected with the operation of its business, however, when limited to charitable institutions, hospitals, or educational institutions conducted for the benefit of its employees or their dependents are a proper deduction as ordinary and necessary expenses."

> "*Donations* which legitimately represent a consideration for a benefit flowing directly to the corporation as an incident of its business are allowable deductions from gross income.

> "For example, a street railway corporation may *donate* a sum of money to an organization intending to hold a convention in the city in which it operates, with the reasonable expectation that the holding of such convention will augment its income through a greater number of people using the cars." (Italics above, added)

Then follows in Article 562 the sentence which causes this case;

> "Sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda, including advertising other than trade advertising, and contributions for campaign expenses, are not deductible from gross income."

We respectfully request consideration of the matter from the view-point of "knowledge by the 75th Congress". Nowhere in any of the revenue acts (then or preceding) was a corporation granted a deduction for "Charitable and other contributions". If the Members of Congress knew *anything*, they knew *that*. With no deduction granted by the Acts, there was no occasion that they read Regulations to ascertain an administrative interpretation regarding something *that was not in the Acts*. Properly, they might read the Article which dealt with "Business expenses", if they desired to know the administrative interpretation of "ordinary and necessary expenses". But, if they read the Article 101 (which stood at page 39 of Regulations 69) that related to "ordinary and necessary expenses", they would find no mention of *business expenses* connected with "the promotion or defeat of legislation",—still less, would they find any reference in Article 101 to the Article 562 (which stood at page 169 in Regulations 69, or *130 pages removed from* the interpretation of "ordinary and necessary expenses" in Article 101).

What the Commissioner in effect says is: Congress had to read Article 561 in Regulations 69, to find out about deductions for corporations, and even though we referred them back to Articles 101-112 to find out about our interpretation of "ordinary and necessary expenses", just the same they should have read Article 562 which dealt with the subject "Donations" regardless of the fact that the Act itself did not recognize any corporate-deductions for "Donations", or for "Charitable and other contributions".

In other words, the Commissioner carries the "reenactment rule" *to everything contained in Regulations*, and if the Members of Congress fail to read every word, to reclassify into proper places,—they are bound by hidden or concealed statements when they repeat the language of one revenue-act in a subsequent revenue-act. With respectful solemnity we say:—"Stop, Look, and Listen!"; The thing is going too far.

Next, we consider the matter relative to Regulations 74 and the specific Article 262 as the Commissioner's reliance.

In those Regulations 74, the Treasury set forth in the Articles 121-132 the interpretation of "ordinary and necessary expenses" as applicable to *all forms of business*, regardless of whether carried on by individual, partnership, corporation, or trust. In Regulations 74 there was no separate Article dealing with corporations (as in Regulations 69, and a reference-back). In Regulations 74, however, the subject of Donations by Corporations finds a placement by the Treasury itself under that section of the Act which deals with "Charitable and other contributions", thus showing (clearly, we assert) that the Treasury *and Congress* must have interpreted the Article 562 of Regulations 69 as relating to the subject of corporate-*donations*, and in no reasonable sense to "ordinary and necessary expenses",—if Article 562 ever was read by Congress.

The matter continued with succeeding revenue-acts. Regulations 77, 86, and 94, dealing with income-taxes under the respective Acts of 1932, 1934, and 1936, restated the Regulations as set forth in Regulations 74 relative to "expenses" and "donations".

But, in Regulations 101 which deals with the Act of 1938 and in Regulations 103 which deals with the Internal Revenue Code, we find a confirmation of our position and of our construction. These newer Regulations (still attempting to interpret the same, identical language that has stood by repetition in succeeding revenue-acts), now places the kinds of "Donations" which are "business expenses" directly within the Articles that deal with *business expenses*. The matter of donations for "promotion or defeat of legislation" still stands within the Article dealing with "Charitable and other contributions" (Article 23(q)-1 as to corporations) and the very same language has been placed in Article 23(o)-1 which relates to "Contributions or gifts by individuals".

In view of the restricted construction placed upon "ordinary and necessary expenses" in the opinion by Judge

Riggs, it is interesting to observe that continuously, as far back as Regulations under the Act of 1918, the Treasury itself has recognized voluntary gifts or donations by corporations to charities as "ordinary and necessary expenses", by a construction of the term relative to "commendable and helpful" as distinct from a proximate causation.

This petitioner incurred expenses for the "promotion or defeat of legislation" in every year from 1924 through 1930, with reporting of those expenses in the respective tax-returns. Nobody within the Bureau of Internal Revenue conceived the idea that such expenses were non-deductible as being the kind of "donations" that were excludible under Articles 562 and 262 of respective Regulations,—until the Bureau's notice of deficiency dated February 8, 1934 (R. 8-11). It clearly enough was known to the Bureau that they *were expenses*, not *donations*.

We were not making "contributions" or "gifts" to anybody. We were in a business where contracts required that we pay the expenses, and we were performing our contract obligations.

### *B—The Reenactment Rule.*

The Commissioner states his basis for litigation by his brief in the court-below as;

> "the repeated reenactment of the same statutory provisions amounts to legislative approval of the administrative interpretation of such provision."

Regardless of whether the rule may favor taxpayers at times, the writer of this brief does not hesitate to describe the rule as being the most pernicious and indefensible theory ever finding injection into jurisprudence. Regardless of court decisions that express the rule, erroneous precedents do not make good-law. (See, "The Struggle for Judicial Supremacy", by Hon. Robert H. Jackson, p. 272 *et seq.*, commenting on 96-years of precedents under *Swift* v. *Tyson*, 36 Pet. 1, being reversed by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.)

In the case at bar, we find an attempt to carry the reenactment rule to the nth-degree of absurdity. That attempt was repudiated by the Board and by three of the judges in the court-below.

Although judicial decisions politely describe the reenactment rule as being founded upon a "presumption" of knowledge by Congress, the Commissioner in the case at bar makes of it a charge of *negligence* against the 70th Congress (responsible for the Revenue Act of 1928) for a failure to anticipate the interpretation which the Commissioner failed to make from 1924 to 1933 inclusive and first made in the year 1934 (or, six years after the 1928-Act).

As previously stated herein, for all the years 1924 to 1930 inclusive, this petitioner was reporting in its tax-returns the deductions for expenses required under its contracts for "the promotion or defeat of legislation". Nobody in the Bureau conceived the thought that the Article in the Regulations dealing with corporate "donations" had an application to such business expenses,—until 1934. Although nobody in the *Bureau* "knew it", the Commissioner now declares that *Congress* should have "known it", when it reenacted the language for "ordinary and necessary expenses" into the Revenue Act of 1928. Surely, if there is a presumption of knowledge by Congress, there cannot be a presumption of *ignorance on the Bureau's part*.

From time immemorial the statutes of the United States have provided for a judicial review in tax matters. Suits in courts have been recognized as the procedure for determining the judicial interpretation of the revenue-acts in application to taxpayers. Suits in court still are recognized, with the addition (since 1924) of procedure for judicial interpretations short of additional tax-payments, through the Board of Tax Appeals with appellate review by the courts.

In no way can a matter reach the stage of a judicial review, except by a Regulation which is adverse to taxpayers or by an interpretation of a Regulation in an adverse manner to taxpayers. If the Regulations and the interpreta-

tions thereof always were favorable, a "case or controversy" never could arise. Only by *adverse rulings* does a judicial review become possible.

That is our system. Unfortunately, perhaps, it is not possible to obtain an Opinion of the Justices in matters of Federal law, such as pertains in some States. Our system necessitates judicial contests for the interpretation of the Federal laws. In no way can a contest arise, so as to result in a judicial interpretation, except by an administrative ruling against the citizen, that in turn causes the citizen to resort to the courts (or Board).

If a reenactment of the law should cause the administrative interpretation to *become the law*, the entire system for judicial review would be a nullity. Then, the adverse ruling *is the law*, and is not the means for creation of a "case or controversy" (See *Helvering* v. *Hallock*, 309 U. S. 106).

Yet, observe this fact;—since 1939 the tax system has existed under the Internal Revenue Code, which is a reenactment of the laws as to the matters of judicial processes in tax matters, review by the judiciary as to "cases or controversies", and judicial interpretations as the final word regarding language applicable to the determination of taxes. It would appear that, just as "Congress" never knew of Regulations when enacting former revenue-acts, it likewise never knew of the "reenactment rule" when it enacted the Internal Revenue Code. Or, it is possible that Congress abolished the "reenactment rule", knowingly, by the enactment of the Internal Revenue Code, and thus restored the Judiciary to its proper functions for judicial review, judicial interpretations, and judicial decisions regarding taxes?

However, it may be observed also, that in no year *prior* to 1939 has any Act of Congress abolished the procedure for judicial reviews, despite the announcement by courts of the "reenactment rule". To the contrary, many amendments have occurred relative to the judicial processes,—even to the extent of adding judges by reason of the increased volume of cases, in large measure tax-cases.

The "reenactment rule" could be excused only for relieving the judiciary from the problems of statutory interpretation, by avoidance of responsibility. It served no stabilizing influence, no certainty for a future guidance,—because it always could be disregarded when judges saw fit to tackle the problem and to decide the question contrary to an administrative interpretation by Regulations. A new Regulation could reverse a former Regulation, with judicial approval. It was founded on a fiction or upon presumption which had no factual basis. It constituted an indictment of the Congress. It merits complete repudiation, and *should be repudiated*,—relative to administrative interpretations of laws of Congress. The rule may have a proper place with reference to matters of administrative *practice*, but it has no place in the realm of *judicial-interpretation*.

The writer of this brief is not embarking alone upon an uncharted sea, nor pioneering in a wilderness, when advancing such out-spoken criticism of the "reenactment rule".

Judge Clark stated in the court-below (R. 65):

> "The writer of this opinion has little faith in this rule. He quite agrees with the learned author of an article in the Yale Law Journal who says:
>
> > 'Among the innumerable fictions which have formed a part of the science of law, that which holds the record for unrealism is the doctrine that where a statute has been reenacted in the same form after an administrative construction, Congress has silently approved and incorporated the existing ruling. Our tax laws are reenacted so repeatedly that this rule is invoked more often than the general statement as to the validity of regulations standing alone. Unfortunately, the reenactment rule presumes an attention on the part of Congress in connection with tax legislation which is more ideal than real. The thought is that Congress, each time it passes a revenue act, has omniscience as to all outstanding regulations and judicial decisions and that it will be thoroughly diligent to correct by legislation

> any interpretation with which it disagrees. There follows the thought that inaction is action in that a failure to legislate implies an agreement with all outstanding regulations, without any apparent distinction as to their interpretative or legislative character.
>
> Anyone cognizant of the processes and exigencies of tax legislation is perfectly familiar with the simple fact that any such presumption is not only artificial, but in large part unfounded . . . '
>
> Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale Law Journal 660, 663-664."

Judge Maris' opinion, with concurrence by Judge Goodrich, deals with Article 262 by agreement with the Board in holding that the Article has no application to the facts in this case. (R. 72-75.)

We agree with Mr. Paul in *Studies in Federal Taxation*, 3rd Series, (restatement of the article in Yale Law Journal quoted above) when he states by note at page 426;

> "The doctrine reminds one of Tourtonlon, who found 'grave philosophic insight in a scene from a drama of the poet Mistral, where galley slaves, as they row, believe they see the light of a fairy castle to which they seem quite near. Perhaps, however, the light is but a star. They sing: "Castle or no castle, let us row as if it were there".' Frank, Law and the Modern Mind, p. 320 (1930)."

We agree with Judge Learned Hand, when stating in *F. W. Woolworth Co.*, v. *United States*, 91 Fed. (2d) 973, 976 (Cert. Den. 302 U. S. 768):

> ". . . To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already . . ."

We express agreement with the statement by Professor Griswold (54 Harvard Law Review 398, "A Summary of the Regulations Problem," at 400):

"For I wish to advance the proposition that *the mere reenactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute*. I would like to put this in the strongest language possible, for it seems to me that the reenactment rule is the real cause of much of the present confusion in the regulations problem. If the reenactment rule could be frankly abandoned, many of the difficulties which have plagued us here would vanish, and regulations could be dealt with as regulations and without the difficulties that have come from a false statutory analogy." (Italics are Prof. Griswold's.)

This brief will avoid a repetition of analysis, comment, and argument, which so ably have been presented by other writers on the subject, and directs this Honorable Court by reference to:

1 Paul and Mertens, The Law of Federal Income Taxation (1934 & Supps.) Sections 3.16-3.20;

Alvord, Treasury Regulations and the Wilshire Oil Case, 40 Col. L. Rev. 252;

Surrey, The Scope and Effect of Treasury Regulations under the Income, Estate and Gift Taxes, 88 U. of Pa. L. Rev. 556;

Brown, Regulations, Reenactment, and The Revenue Acts, 54 Har. L. Rev. 377;

Paul, Use and Abuse of Tax Regulations in Statutory Construction, 49 Yale L. J. 660, reprinted with some changes in Paul, Studies in Federal Taxation, Third Series, 420;

Griswold, A Summary of the Regulations Problem, 54 Har. L. Rev. 398;

84 Lawyers Edition 28 (Note to Sanford's Estate v. Com. 308 U. S. 39);

73 Lawyers Edition 322 (Note to United States v. Missouri Pac. Railroad Co., 278 U. S. 269).

Without incurring repetition, however, we analyze facts which are pertinent to this particular case and the Commis-

sioner's charge against the 70th Congress that it *should have known*, when it enacted the Revenue Act of 1928.

The entire House of Representatives was elected in November 1926, with about 65 of the Members not having served in the 69th Congress that enacted the Revenue Act of 1926; some of the Senators were newly elected. The First Session of the 70th Congress did not convene until December 5, 1927. During the 69th Congress a surplus in the Treasury was evident and the "leaders" agreed that the succeeding Congress would enact amendments to the revenue-laws for *reduction in taxes* (See, Report by Chairman of Ways and Means Committee, Report No. 2, 70th Congress, 1st Session, page 1). Prior to the convening-date, the Ways and Means Committee held public hearings from October 31 to November 10, 1927. The Committee introduced a Bill on December 7, 1927 as H.R. 1 (being the first Bill introduced at that Congress), expressing the views of the Committee as regards reductions in the taxes. The Bill passed in the House on December 15, 1927, or eight days after its introduction. Two days prior to that passage-date, or on December 13, 1927, the same Ways and Means Committee introduced into the House, H.R. 7201 which was the Bill which evolved into the Settlement of War Claims Act. That Bill passed in the House on December 20, 1927.

It would appear enough of an impossible task to presume knowledge by the Members of the 70th Congress with regard to the thousands of *Bills* which came before them, without adding as a presumption that they were thoroughly conversant with Treasury Decisions as Regulations and with Treasury Decisions as amending Regulations,—and with interpretations in all manner of other administrative departments.

Thus, by December 20, 1927, both Bills, H.R. 1 and H.R. 7201, stood in the Senate with assignment to the Senate Finance Committee. That Committee saw fit to accord expedition to the H.R. 7201 and the Settlement of War Claims Act was enacted March 10, 1928.

Relative to the H.R. 1, the Senate Finance Committee held public hearings from April 9-13, 1928, with the Bill being referred back to the Senate May 1, 1928 and enactment into law on May 29, 1928.

Regulations 69, construing the Revenue Act of 1926, were promulgated August 28, 1926. Between that date and May 29, 1928, as the enactment date of the Revenue Act of 1928, sixteen separate Treasury Decisions were issued by way of specific amendments to specific Articles of the Regulations 69,—three of those Treasury Decisions being issued while the H.R. 1 was under consideration in Congress. After the enactment of the 1928-Act, additional Treasury Decisions were issued by way of amendments to the Regulations 69, four in 1928, four in 1929, and four in 1931. Although the 1928-Act was enacted May 29, 1928, the Regulations 74 pertinent thereto, did not issue until February 15, 1929 or about two-weeks prior to the termination of the 70th Congress.

During 1929, 1930, and 1931, and after the issuance of Regulations 74, eleven Treasury Decisions were issued, by way of specific amendments to Articles in Regulations 74. Between January 1932 and December 1934, there were nine Treasury Decisions which specifically amended Regulations 69 and nine likewise that amended Regulations 74. During that latter period, revenue-acts of 1932, 1933 and 1934 were enacted, with three new sets of Regulations and with amending Treasury Decisions.

With the observation that Regulations 69 were issued as Treasury Decision No. 3922, it may be interesting to note that, with consecutive numbering, we have reached at the moment of this writing No. 5043.

In addition to all the Regulations and more than 1100 Treasury Decisions, we perceive the interpretation of tax-laws in 44-volumes (1500 pages each) of decisions by the Board of Tax Appeals, and court decisions (carrying only into the year 1940) in 24 volumes (1200 pages each) of "American Federal Tax Reports." Additionally, there have been innumerable publications of "rulings," "opin-

ions" and such, by the Treasury Department of a nature less important than Treasury Decisions.

Hundreds of the court-decisions have found a re-publication as Treasury Decisions, thus giving them an importance equal to direct administrative interpretations. Hundreds of the Board's decisions have received published acquiescence by the Commissioner.

In such a confusion of volume and contradiction, together with the continuous changes in the personnel of "Congress," the presumption of knowledge on the part of the varying membership, so that inaction becomes action by way of approval of Regulations (particularly as the Regulations constantly are being amended by Treasury Decisions), is a thing which becomes unbelievable.

The fallacy of "the theory" has another aspect. Since 1939 we have existed under the Internal Revenue Code. As amendments are proposed in revenue bills, it is done by specific amendments to certain sections or subdivisions of the Code. Regulations 103 purports to interpret the Code and articles therein find amendment by specific Treasury Decisions. In other words, there is no reenactment of the language in a previous revenue-act that has been construed by a Regulation. The new revenue-bills are silent except as they expressly state amendments. It would appear equally justified to declare that a *failure to amend* some unamended section of the Code that had been incorrectly interpreted, constituted an approval by Congress with regard to such unamended portion, as that it approved the language of the Regulation-article which dealt with the amended portion *except for the amendment*. The realm of "presumptions" holds no limits. (Recently so holding, see: *Jones* v. *Goodson*, 121 Fed. (2d) 176.)

"The theory," also, practically paraphrases the maxim *Ignorantia juris neminem excusat*, into the proposition: Congressional ignorance of an administrative interpretation does not excuse that interpretation from becoming an Act of Congress, when in ignorance of the interpretation the same language of the law is reenacted.

Thus, the failure by a Congress to know of an administrative interpretation of a previous Act of a prior Congress, compels the next Congress to have an Congressional-intent identical with the administrative interpretation of the previous Act. An estoppel is invoked, against Congress and against a judicial interpretation *by the courts*. We seriously wonder about that, when we contemplate the fact that a Board of Tax Appeals was created by an Act of Congress and has functioned now for seventeen years.

The Board was established under the Revenue Act of 1924 and was made quasi-judicial by amendments in the Revenue Act of 1926. It was established, expressly, as "an independent agency" with jurisdiction to review the determinations of the Commissioner. Decisions of the Board, in turn, stand reviewable as to questions of law by circuit courts of appeals. If "the theory" operates, the establishment of the Board as a reviewing agency was a futile effort; the reenactment of the revenue-act, as an approval of Regulations, debars the Board from any interpretation of a revenue act which is contrary to a Regulation. Thus, the Regulations *are the law*, and when Congress granted the right of appeal to taxpayers, the whole thing was an empty gesture. If all that the Board can do, is to ascertain the facts and to apply thereto the Regulation, that is no different from what the taxpayer could get from the Bureau itself. A complete review of a deficiency by an independent agency never was granted. Circuit courts of appeals cannot review questions of law, because the Board cannot decide them if the Regulations cover the subject. If all that were true, we gaze upon seventeen years of operations, with sixteen members of the Board receiving salaries of $10,000 each, with an organization of more than 100 assistants working with the Board,—all for no purpose except to hear the evidence and apply it to interpretations by Regulations. Why then, we inquire, the provisions for review by the circuit courts of appeals on questions of law? The "defendant" in the Board proceedings is the very same person (Commissioner) *who writes or approves the Regulations;* how can the Board in-

erpret his Regulations contrary to his interpretation *in the very case?* If the Board cannot, there is no "question of law" for a judicial review.

If the Board cannot, then the courts cannot adjudicate in suits for refunds. The Administrative thus has supplanted both the Legislative and the Judiciary.

It is little wonder that this matter of "legislative approval" has received such study and criticism as comes to light in the writings by Mr. Paul, Prof. Griswold, Prof. Surrey, and the others whom we have cited herein.

The favorite argument for the "reenactment rule" is the idea of "long-continuedness" (as described by Prof. Griswold). Obviously, an administrative interpretation that is favorable to taxpayers is certain to be "long-continued." The only way the question ever can reach the courts is by an *unfavorable* interpretation. If a new regime in the Administration disagrees with the interpretation of predecessors, the judicial processes should not be barred. Only by such a reversal of interpretation may the judicial processes be called upon for action.

Nor, should the "long-continuedness" of an administrative interpretation that is detrimental to taxpayers, without judicial review, carry the presumption of correctness because of the lack of litigation and judicial decision. There are many explanations of non-litigation. Tax-cases usually involve many issues. Settlements may be by a "give-and-take" process, with concessions made on both sides of the table. In the final analysis the settlement is a matter of dollars, a lower deficiency or a lower refund by granting one issue upon the taxpayer's agreement not to litigate the very question that appears to be "long-continuedness."

Then, again, the "long-continuedness" may result from an *interpretation* of the Regulation in a manner favorable to taxpayers. So long as the interpretation remains favorable, no judicial decision can result.

"Long-continuedness" finds at its basis the doctrine of *stare decisis*. But it goes even further, because it imputes

the doctrine to Congress itself, binding it by a lack of litigation or by silence.

If there be any virtue in "long-continuedness" it should have an application to the very case at bar. Why not presume that Congress, when enacting the Revenue Acts of 1924, 1926, and 1928 (and 1932 as well) was cognizant of an interpretation of the Regulations, that they had no application to the facts of our situation,—as to presume (as the Commissioner here insists) that the reenactment approved an interpretation that the Commissioner never conceived until the year 1934?

### *C.—The Super-Enactment Rule.*

The opinion of Judge Biggs in the court-below (R. 49, 50) construes the Article 262 in Regulations 74 by the action of a Congress *eight-years later*, the 74th Congress when enacting the Revenue Act of 1936.

That opinion finds a purpose by the 74th Congress to condemn expenses relative to the "promotion or defeat of legislation" when made as *donations*, in a situation where that Congress, for the first time, gave recognition to the right by corporations to deduct gifts to charitable corporations by limitation to 5 per cent of the net income.

That opinion, we respectfully submit, fails utterly to realize the distinction between "donations" and "expenses". The opinion reasons that, if expenses relative to legislation were deemed to be "ordinary and necessary expenses" by the 74th Congress, there would have been no reason for that Congress granting the deduction for *donations*. As the 74th Congress so interprets, declares the opinion, the *70th* Congress must have interpreted likewise.

The fallacy lies in even attempting to interpret the thoughts of the 70th Congress by the occurrence of legislation eight years later. We describe such reasoning as the "super-enactment rule" because it binds an earlier Congress by the actions of a later Congress.

But, additionally, we disagree most decidedly with the interpretation even regarding the "mind" of the 74th Congress.

In the first place, the Act of 1936 was *not* the origin (as Judge Biggs states) of that provision. It originated in the Revenue Act of 1935, finding a first suggestion in a minority report of the House Ways and Means Committee.[1] It had been suggested as far back as 1918, that corporations should be allowed deductions for gifts or contributions to charitable organizations.[2] That proposal was rejected in the Act of 1918. But, such a measure actually was incorporated into the Bill that passed the House in 1921, in the process of legislation into the Revenue Act of 1921. It was rejected by the Senate Finance Committee. The Conference Committee Report stated:

> "The House bill extended to corporations the provisions of existing law allowing individuals to deduct contributions made for charitable purposes, limiting the amount of such deductions to 5 per cent of the net income. The Senate amendment strikes out the provision; and the House recedes."[3]

After the failure of the measure to receive approval in the Revenue Act of 1921, the subject was discussed at successive hearings on subsequent revenue legislation.[4] In 1935 the provision was adopted into the Bill upon the floor of the House, the Committee not having made any recommendation.

The only way that the amendment of 1935 changed the previously existing situation was, by authorizing deductions for payments made to charities, even though the payments *bore no relation to the operation of the business.* The 5 per

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[1] House Report 1681, 74th Congress, 1st Session, p. 20.

[2] Seidman's Legislative History of Federal Income Tax Laws, 286.

[3] House Report No. 486, 67th Congress, 1st Session, p. 36.

[4] Seidman's, Legislative History of Federal Income Tax Laws, 287.

cent limitation relative to net income, was identical with all previous suggestions back to 1918 when the proposal had its origin. The limitation—"no part of the net earnings of which inures to the benefit of any private shareholder or individual"—also was found in the earlier suggestions. The only new language was,—"and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation". New also, was a clause authorizing a check-up by the Commissioner through rules and regulations. Thus, we find evolving into the Revenue Act of 1936 an entirely new provision of law:

> "23 (q). Charitable and other contributions by corporations.—In the case of a corporation, contributions or gifts made within the taxable year to or for the use of a domestic corporation . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or the prevention of cruelty to children . . ., *no part* of the net earnings of which inures to the benefit of any private shareholder or individual, *and no substantial part* of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation; to an amount which does not exceed 5 per centum of the taxpayer's net income as computed without the benefit of this subsection . . ." (Italics added.)

The analysis by opinion of Judge Biggs distorts, we submit, the intention of Congress even in 1935 and, it should be noted, this case at bar involves deductions of 1929 and 1930. That analysis also glides over the actual language used by Congress.

Congress was not limiting corporate payments to charities where the payments constituted "ordinary and necessary expenses". Rather, it was granting a concession for charitable donations in instances where the payments *had no relation to business expenses*. The motive for the concession is expressed in that Minority Report[5]:

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[5] See Note 1.

> "If corporations are public spirited enough to make contributions to charities, we believe their contributions for such purposes should be exempt from taxation exactly as is done in the case of individuals."

May it be noted further, that by the very language quoted above, Congress did not deny the deduction if *some part* of the charities' activities involved legislation. The denial of the concession by way of deduction was to occur only if a "substantial part" of the activities had legislative purposes. The distinction is clearly expressed;—"no part" of the earnings inuring to shareholders and "no *substantial* part" of the activities involving legislation.

A hospital, a college, a community chest, even a Red Cross, might seek the grace of legislation for its activities. Funds derived through contributions might find such a use. But, only where a "substantial" part of the activities were directed toward influencing legislation, was the concession to be denied.

Here was something which had nothing to do with the business itself. For more than twenty years corporations had been obliged to bear taxes upon so much of the net income as was contributed to charities, in instances where there was no business relation. In effect, a corporation had been penalized for gifts to charity. This voluntary concession by Congress sought the encouragement of such gifts through tax exemption within limitations.

We submit that such a discretionary concession by the 74th Congress has no bearing whatsoever upon the question presented in this case, namely with regard to the interpretation of an Act of the 70th Congress.

It no more would be fair to declare that the 1935-amendment shows that the 74th Congress has condemned "lobbying", than to say that it deemed improper the fact that net earnings might inure to a private shareholder in a charity. A school, a college, or a hospital, may have private shareholders; 99 per cent of the activity may be educational or charitable. But the fact of even a small phase of earnings

inuring to the benefit of a private shareholder, destroys the tax-exempt nature of the contributions. That is not because it is morally wrong or illegal that a private shareholder should profit. Arbitrary or not, that merely is a condition that Congress has stated, and the condition must be met when the concession is sought. Arbitrary or not, a similar condition applies where a "substantial part" of the charities' activities involve the influencing of legislation.

Note how Regulations 94 interpreted that change in the law, by Article 23 (q)-1:

> "A corporation is entitled to deduct from gross income for a taxable year beginning after December 31, 1935, contributions or gifts to organizations referred to in section 23(q), *whether or not such contributions or gifts constitute business expenses*, but only to the extent provided in that section. . . ." (Italics added.)

As evidencing the value of "interpretations by regulations" it might be noted also, that the remainder of the Article proceeded to interpret the new provision as a limitation to 5 per cent of the net income even where the gift held a relation to a business,—such as to a hospital where the employees received treatment. Here was new legislation of a remedial nature, extending deductions,—yet it finds interpretation by way of restriction as compared with the previous Acts.

*D.—The Reasoning by Opinion of Judge Maris Relative to Article 262 of Regulations 74 and the Sunset-Scavenger Case, is Sound and Should Be Approved.*

The opinion of Judge Maris (R. 72-75) so thoroughly and convincingly covers the Article 262 and the decision in *Sunset Scavenger Co.* v. *Commissioner*, 84 Fed. (2d) 453, (the Commissioner's sole reliance before the Board), as to permit our avoidance of argument by repetition. Therefore, we respectfully make reference to the Record in that regard, and we discuss that case only briefly.

That decision is based upon "the reenactment rule" wholly, so our discussions of that rule apply to that decision.

Additionally, however, there are such clearly marked distinctions between the facts in the case at bar and the situation in that decision, that they merit comment.

*Special legislation*, such as we sought under contracts which caused our actions to be the very business in which we were engaged is decidedly different from a matter of combatting *general* legislation,—such as the City Ordinance pertinent to the collection of garbage in the *Sunset-Scavenger* case, as a matter of such pronounced public-interest.

The business itself of the Sunset Scavenger Company was the collection of garbage, a matter which, under the police powers, the city-fathers had the right to control in the interest of the public health.

On the other hand, so far as concerned the German-nationals whom we represented, the Trading with the Enemy Act *was special legislation*, because it dealt specifically with the seizure of their property in the United States. It was special legislation *as to them*, even though it found a public purpose as a war-measure.

That Act expressly stated in Section 12:

> "After the end of the war any claim of any enemy . . . to any money or other property received and held by the alien property custodian . . . shall be settled as Congress shall direct."

That Act recognized the existence of claims by seizures and recognized, further, for special legislation to settle the claims.

The Settlement of War Claims Act was special legislation as to the American-claimants and it was special legislation as to the German-claimants. Obviously, the claimants so specially affected, were the proper persons to advocate the terms of the special legislation by way of settlement, just as with any Bill relating to any particular person. Who else is to urge it and discuss it with the Members of Congress, *than the person himself?* For obvious reasons, the

persons who were located thousands of miles away in Germany had to engage representatives in the United States.

But, one other fact merits mention. Throughout the entire history of revenue-laws, there never has been either a provision of law *or a regulation by way of interpretation*, to the effect that the expenses of individuals, partnerships, or trusts which engage in business, are non-deductible as relating to "the promotion or defeat of legislation". If the thing held the slightest aspect of inherent wrong, there is no reason for permitting the deductions to one form of business and not permitting it to another,—such as corporations. Perceive the pertinency of that statement *to this case*. Our contracts were made with an *individual* (R. 34) and he assigned them to the corporation. (R. 34)

If the assignments had not been made, the deductions would have been recognized to the individual although expenses for legislation (See, *Lucas* v. *Wofford*, 49 Fed. (2d) 1027). That decision would have controlled the matter if the assignments *had not been made;* but, declares the Commissioner, the *Sunset-Scavenger* case controls the matter *because the assignments were made*,—and "the reenactment rule."

We respectfully inquire: Can there be the slightest justification for "the reenactment rule", when it means the application of one rule of law to two or three persons engaged in business through the partnership-form and an entirely different rule when those same persons conduct their business through the corporate-form? Can there be any sense for it, to change the applicable legal principles when a single-person operates as a corporation instead of by a sole-proprietorship?

We submit that the questions convey their own obvious answers and that, when we describe "the reenactment rule" as being carried into the realm of "absurdity" by the Commissioner's contentions, our language is most conservative.

## III.

### Concluding explanation.

We submit to this Honorable Court that the judgment of the court *en banc* should be reversed; that a circuit court of appeals for the Third Circuit Comprising Judges Maris and Goodrich as a quorum thereof should be directed (pursuant to the Motion filed by the petitioner in that court, R. 76-78) to order a judgment by way of affirmance of the Board-decision; and that the reasoning by opinion of Judge Maris (R. 66-75) and by opinion of the Board (R. 13-22) merit the approval of this Court by the entry of any other form of appropriate Judgment for the Petitioner.

We urge further, that the court *en banc* was lacking in authority to reverse the Board-decision upon new issues that were not presented to the Board and, in that regard, we refer to the citation of precedents at pages 23 and 24 herein.

The foregoing portion of our Argument covers the issue that was presented to the Board, was appealed by the Commissioner to the Third Circuit, and was decided favorably to the petitioner by a majority of three judges in the court *en banc*. The additional length of this brief is occasioned wholly by the injection of the new-issues in the court below; our brief would stop at this point, except for the compulsion that we discuss those "new issues".

# ARGUMENT

## Part 2. The New Issues in Appellate Court

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### I.

### Introductory.

This remaining portion of our brief is occasioned by the injection of "new issues" by the opinions of Judges Biggs and Clark in the court below and an entry of judgment predicated on their conclusions regarding those "new issues". The reasoning in those opinions can be expressed by a Syllogism:

Major Premise:—Criminals are taxable upon their entire gross receipts from their criminal operations, without deductions for their expenses incurred in performance of their crimes.

Minor Premise:—The petitioner was a criminal, because,

1. It operated under contingent contracts for the procurement of legislation, or
2. It sought for its principals "favor" legislation, in distinction from "debt" legislation, or
3. Representation of enemy-aliens in the procurement of legislation for the return of their properties, seized under the Trading with the Enemy Act, was illegal, or
4. The contracts were void as being against public policy.

Conclusion:—The deduction of the expenses is not allowable.

When petitioning this Court for Certiorari we had not the slightest interest in the establishment of a precedent relative to the considerations involved in the Major Premise of that syllogism. We are not concerned in the least degree as to how the taxes of the criminals may be determined,

whether they range from the organized murderers such as "Murder Inc.," down to the innocent seller of food products who operates his business after the expiration of his Victuallers License, negligent in the failure at renewal.

If the Bureau of Internal Revenue desires to be "an accessory after the fact" by participating in the fruits of the crimes through the process of "taxation", that is the Bureau's concern.

It has been the general understanding that Taxation held as a fundamental basis the idea of imposition of taxes relative to the "ability to pay" the taxes, and we can perceive no "ability to pay" relative to the criminal whose expenses exceed his receipts. The only method within our perception, whereby he can find such "ability to pay" is, by the continuation of his criminal pursuits in the hope that they eventually may be profitable. There again, if that is what the Bureau desires to encourage, it is the Bureau's concern.

We sought the consideration by this Honorable Court because, in addition to the importance of questions, an innocent citizen, engaged upon an honorable venture, is classified among the criminals by a lower court, without the slightest provocation or excuse, and only by injecting into a case issues that were not properly before that court. We owe it to ourselves and to other citizens, to pursue and seek Justice, without regard for monetary considerations.

The final decision in this case will not constitute a precedent to affect our taxes in any years prior or subsequent to the year here involved, 1931, because all other years in which we incurred similar expenses have been closed by the Bureau without questioning the expenses.

We sought the jurisdiction of this Court by reason of the importance of many questions involved herein, and that importance finds clear confirmation in the interest expressed relative to the opinions in the lower court, with unanimous criticism of the two opinions to which we object:

54 Harvard Law Review, 698, 699; Note on decision below;

54 Harvard Law Review, 852-866; Note on decision below;
8 University of Chicago Law Review, 774-779; Note on decision below.

The Conclusion in the syllogism is erroneous, because *both* the Major Premise and the Minor Premise are *false*.

Our main interest, however, is in the falsity of the Minor Premise. Accordingly, we will devote our discussion mainly to that Minor Premise, dealing also with the Major Premise by way of rendering full assistance to this Court.

## II.

## History of The Settlement of War Claims Act of 1928 With Relation to Petitioner's Connection Therewith.

The actual fighting in World War No. 1 ceased with the signing of the Armistice on November 11, 1918, but the state-of-war as between Germany and the United States continued for two and one-half years thereafter. That war finally was terminated by Congress, by Joint Resolution of July 2, 1921 (42 Stat. L. 105). By Section 2 of the Trading with the Enemy Act (40 Stat. L. 411) the words "end of the war" were defined "to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act."

The Treaty between The United States and Germany, was signed at Berlin August 25, 1921. By Presidential Proclamation of August 25, 1921, it was declared that the war with Germany terminated on July 2, 1921.

Section 3 of the Trading with the Enemy Act prohibited during the war all trade, dealings, and intercourse, as between persons in the United States and an "enemy" as defined in that Act.

By Section 2 of that Act the word "enemy" was defined to mean;

> "Any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war, or resident outside of the United States and doing business within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. . . ."

Authority was granted the President, by proclamation, to include within the term "enemy", individuals wherever resident or wherever doing business, who might be "natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States".

The Act authorized the seizure of the property of "enemies", through an Alien Property Custodian.

It will be noted that the definition of "enemy" placed dependency upon the fact of *residence* of the person, rather than his nationality. Accordingly, as the armed forces of Germany occupied territory in France, Belgium, and other allied or neutral countries, the persons who were resident within those occupied territories automatically became "enemies", with their properties in the United States subject to seizure under the Act. The definition also found extension through Presidential action from time to time, with the result that some 5,000 persons experienced internment in the United States and their properties were seized.

At the height of the seizures the total of property in possession of the Alien Property Custodian amounted to approximately 800-millions of Dollars (the exact amount never was accurately determined).[1]

In Section 12 of the Trading with the Enemy Act was this important provision (important from the standpoint of this case):

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[1] At the time of the Settlement Act it amounted to about 250-millions.

> "After the end of the war *any claim* of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, *shall be settled as Congress shall direct*:" (Italics added)

After the signing of the Armistice and prior to the Joint Resolution of July 2, 1921 (*supra*), and with the state of war still in existence, Congress enacted three successive Acts by way of amendments to the Trading with the Enemy Act, ordering releases as to the properties which had been seized from "enemies" *in certain, particular situations.*

An Act of July 11, 1919 (41 Stat. L. 35) provided in part:

> " . . . That in respect of all property heretofore determined by the President to have been held for, by, on account of, or on behalf of, or for the benefit of a person who was an enemy or ally of enemy solely by reason of residence in that portion of the territory of any nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany . . . and that such person is a citizen or subject of such associated nation, then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian . . . to the said enemy. . . . And the receipt of the said enemy . . . shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States as the case may be, and of the United States in respect of all claims of all persons heretofore or hereafter claiming any right, title, or interest in said property, or compensation or damages arising from the capture of such property by the President or the Alien Property Custodian . . ."

That Act made restoration to persons who were "enemies" only because of residence in the occupied-territories and whose allegiance was to an "associated nation". But, it will be observed, Congress recognized the *existence of claims* resulting from the seizures, and insisted that res-

torations should constitute the *release and discharge of claims*. May it be noticed, also, that the Act recognized that the properties seized, had been "held for, by, on account of, or on behalf of, or for the benefit of a person who was an enemy".

We will discuss later herein the history of the Trading with the Enemy Act, but we emphasize at this point; that Act was enacted by the 65th Congress, while the 1919-Act was enacted by the 66th or succeeding Congress. In the very first legislation after the Armistice, we find confirmation in two regards,—the trustee nature of possession by the Alien Property Custodian, and recognition by Congress that claims existed. That was in 1919.

An Act of June 5, 1920 (41 Stat. L. 977) again amended the Trading with the Enemy Act (Section 9) so as to authorize restorations to certain, various other classes of claimants (eight categories in all). Those restorations were to be "without any application being made therefor" and, as with the 1919-Act, the receipts constituted "a full acquittance and discharge . . . in respect to all claims of all persons . . ."

An Act of February 27, 1921 (41 Stat. L. 1147) covered restorations to certain women who had married Germans or Austrians, and amended Section 9 of the Trading with the Enemy Act.

*After* the Joint Resolution of July 2, 1921 (*supra*) only one other Act for partial restoration occurred, "The Winslow Act" of March 4, 1923 (42 Stat. L. 1511). That Act amended Section 9 of the Trading with the Enemy Act and added new sections (20 to 24 inclusive) to the Trading with the Enemy Act. By the Winslow Act provision was made, for the first time, for restorations to German and Austrian Nationals,—that is, to "enemies" who were residents of those countries; but, the payments were limited to $10,000. in each instance. That Act disposed of a large number of the smaller claims and made restitution to all others up to the $10,000. limit. That Act, also, permitted annual pay-

ments of income of claimants, up to a $10,000. limit. The Section 23, thus added to the Trading with the Enemy Act, is significant;

> "The Alien Property Custodian is directed to pay to the person entitled thereto, from and after the time this section takes effect, the net income, dividend, interest, annuity, or other earnings, accruing and collected thereafter, *on any property or money held in trust for such person by the Alien Property Custodian* or by the Treasurer of the United States for the account of the Alien Property Custodian, under such rules and regulations as the President may prescribe; but no person shall be paid, under this section, any amount in excess of $10,000 per annum." (Italics added)

We respectfully direct the attention of this Court to that italicized language, and we ask comparison with Record, p. 33, where the petitioner's contract of representation is set forth. We quote from the contract-form;

> "to protect the interest of the Claimant in *moneys and/or properties now held in trust for the Claimant by the Alien Property Custodian . . .*"

The petitioner's services were engaged by contracts beginning in the year 1924 (R. 30) and the very form of *contracts* took a position that was identical with the position of 67th Congress which enacted the Winslow Act, in practically the identical language of the Winslow Act. The claimants were the *beneficiaries under the trusts* and we were representing their rights and interests as such beneficiaries, seeking a judgment with regard to their *equitable rights.*

Yet, declares the opinion of Judge Biggs (R. 46),—"The contracts between the taxpayer and its clients were to procure "favor legislation" as distinguished from "debt legislation". The performance of Equity may rest upon a sound discretion, but it does not depend upon "favor".

Except for an Act of May 7, 1926 which made slight clarification to Section 9 by adding restoration for persons who had become citizens of neutral countries and had acquired their seized-properties while bona fide residents of the United States, there were no amendments to the Trading with the Enemy Act between the Winslow Act of 1923 and the Settlement of War Claims Act of 1928.

Five years elapsed after the Armistice, before the German and Austrian *nationals* (residents, citizens, and subjects of those countries) received any restoration (the $10,000 limit by the Winslow Act); five years more elapsed before provisions were made by the Settlement of War Claims Act for restorations to the 80 per cent extent of those provisions,—to the *nationals*.

Our contracts were with the *nationals* of those countries, and our engagement in their behalf began in 1924, or three years after Peace and the restoration of friendly relations through the Treaty of Berlin.

We have felt the necessity for mentioning the foregoing facts, because in the court-below the Commissioner's attorney tried to disparage or minimize the importance of our representation, asserting that because Congress made provisions for restoration in restricted instances, our services were not necessary and amounted to nothing.

It would seem to suffice, that the *German nationals* deemed our services so essential that they contracted for our representation.

The necessity for American-representation on behalf of the Germans, will appear clear by a further recital of the history.

The Treaty of Berlin (42 Stat. 1939) (Treaty Series, No. 658, Government Printing Office, 1922) included as a preamble, the Joint Resolution of July 2, 1921 as to Sections 2 and 5. The pertinent part of Section 5, as included in the Treaty, was;

> "All property . . . of all German nationals, which was on April 6, 1917, in or has since that date come into

> the possession or under the control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees . . . shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law *until such time as the Imperial German Government . . . shall have respectively made suitable provision* for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government . . . since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly . . ." (Italics added)

That restriction by Congress, that the property in possession of the Alien Property Custodian would not be returned, until the German Government had made "suitable provisions" for the payment of the claims against Germany by American citizens, became the crucial element in the entire matter of legislation for return to the Germans; because of it, it became necessary for the Germans to engage the services of representatives in the United States (such as the petitioner); because of it, the matter of legislation by a Settlement Act became a contest between the two groups of claimants (American against Germany, and German against the United States), both waging their contest through representatives or agents, with the Congress in the status of court or judge. The representatives of the American-claimants pleaded with Congress to provide the "suitable provisions" by the confiscation of the properties of the Germans in satisfaction of the American-claims; the representatives of the German-claimants (including the petitioner through its attorneys and agents) pleaded that the German-properties be restored and that the American-claimants be cared for in some other way. That situation of an impasse continued into December 1926.

The solution came (eventually the Settlement of War Claims Act itself) because the representatives of the two

groups of claimants, compromised their disagreements and *agreed upon the kind of Act which Congress should enact.*

We quote from House Report No. 17, 70th Congress, 1st Session, being the Report presented by Chairman Green when introducing into the House the Bill which eventually became the Settlement-Act, page 4 of that Report:

> "It was essential, in the judgment of the committee, that the bill should provide for—
>
> (1) The settlement of the claims of the United States and its nationals against Germany and its nationals;
>
> (2) The settlement of the claims of Germany and its nationals against the United States;
>
> (3) The return of the property held by the Alien Property Custodian which was seized during the war as the private property of citizens of countries with which we were at war; and
>
> (4) The temporary retention of sufficient of the German property to reasonably insure the payment of the American claims and the return of the property thus temporarily withheld as the American claims are paid.
>
> But it was not practical to do this unless concessions and compromises should be made by the respective claimants. Recognizing this, *these parties and their representatives voluntarily got together and agreed upon the concessions to be made by each. The present bill proposes to carry out this agreement.*" (Italics added)

Chairman Green made a more extended statement upon the Floor of the House (Cong. Rec. Vol. 68, Part 1, page 594):

> "At the fall session of the committee further hearings were had for about 10 days. At the close of the hearings, when it seemed as if our labors might again have no result, I made a suggestion to the claimants. In substance, I stated that the hearings so far seemed to have resolved into *a contest between the German claimants on one side and the American claimants on the other*, each insisting, in effect, that their claims

should be paid in full and the other side should wait indefinitely; that it appeared to me that as long as this attitude was continued there was little hope of a settlement; but that *if the claimants were disposed to make mutual concessions and agree that the payment of an equitable proportion of the claims on each side should be deferred*, that I thought that by making an appropriation only for the payment of those items for which it was generally conceded our Government was liable, the committee could work out a bill. I confess that at the time I made this suggestion I had little hope that it would be accepted. *It required a mutual spirit of compromise*, . . . I was, however, agreeably surprised over the manner in which the suggestion was received. The claimants, *through their representatives*, immediately conferred with each other and in a short time came to a *complete agreement* . . . All the claimants, so far as I know, now unite in support of the bill and are earnestly urging its adoption . . ." (Italics added)

The complete statement by Chairman Green, at the close of the House hearings, will be found at page 620 et seq., Vol. 4, Return of Alien Property, Hearings before the Committee on Ways and Means, 69th Congress, Interim First and Second Sessions, (Government Printing Office publication).

The signed-agreement will be found at page 129, Return of Alien Property, Hearings before the Committee on Finance United States Senate, 69th Congress, Second Session, (Government Printing Office publication). The agreement was introduced as part of the record on January 13, 1927. The signatures were those of "William P. Sidley, For the American Claimants, and W. Kiesselbach, For the German Claimants," each representing certain groups of claimants. Mr. Sidley was Chairman of an organization, "American War Claims Association" (P. 20, Senate Finance Committee hearings, January 23, 1928); Mr. Kiesselbach was the German commissioner on the Mixed Claims Commission and particularly represented the German ship-owners (P. 181, Senate Finance Committee hearings, January 14, 1927).

That agreement publicly was approved by the petitioner on behalf of the claimants which it represented, by statement of the petitioner's attorney (R. 31) (Frank W. Mondell), to the Senate Finance Committee, (Pp. 1-20, Senate Finance Committee hearings, January 23, 1928).

The very title of the Bill as first introduced into the House and as carried through into the final Act, was expressive of that agreement between the respective claimants;—"To provide for the *settlement of certain claims* of" (American nationals against Germany and nationals of Germany against the United States) "and for the ultimate return of all property held by the Alien Property Custodian."

The inquiry might be made;—Why did the German nationals have to engage the services of American-representatives? Why did they not act through diplomatic channels?

Conclusive answers to those questions are found in Senate Document 173, 69th Congress, 2d Session, entitled "American War Claims Against Germany," and comprising diplomatic correspondence between July 1921 (after the Joint Resolution terminating the war) and December 1926. As briefly as possible, we quote from that document:

Page 4. The American Commissioner at Berlin (Dresel) to the Secretary of State (Hughes), Berlin, July 22, 1921:

> ". . . Rosen requested me to con alt Department urgently as to advisability of giving publicity to memorandum . . . He requests me also to suggest that simultaneously with publications in America a declaration might be issued stating the intention of the United States to restore German property in the hands of the Alien Property Custodian. He said this would have most favorable effect on German people and would be a distinct success for the government which they so much needed. I discouraged him on possibility of such a statement pointing out that it would be an anticipation of the action of the Congress and possibly unlawful. It may be possible to give an assurance that the President will recommend such action to Congress but I did not suggest it to Rosen . . ."

Page 5. Secretary Hughes replied; July 23, 1921;

". . . You correctly stated position as to property in hands of Alien Property Custodian, as Congress alone has power to deal with that matter . . ."

Page 6. (Dresel to Secretary Hughes, July 27, 1921);

". . . As to American decision that a declaration in regard to alien property custodian fund was impossible at present, Rosen expressed regret but stated that he understood the reasons for American attitude . . ."

Page 13. Secretary Hughes to Dresel, August 20, 1921;

". . . The Administration is fully appreciative of the considerations entertained by Germany with respect to property sequestered here, and desires a just and reasonable settlement. There is nothing, however, for Germany to gain by opposing the terms of the Peace Resolution or by insisting on anything which could be claimed to be a departure therefrom in the proposed treaty.

It is earnestly urged, with full regard for all the circumstances, that the signing of the Treaty as proposed by this Government . . . will pave the way for consideration of the questions relating to property sequestered here which the President desires to be dealt with upon the most fair and righteous basis. It is hoped that Germany's attitude toward this subject will not put obstacles in the way . . ."

Pages 14 to 33 inclusive cover diplomatic correspondence from February 22, 1922 to August 10, 1922, relating to the establishment of the Mixed Claims Commission for adjudication of claims by Americans against Germany. At page 22 we quote from Ambassador Houghton to Secretary Hughes;

". . . the German Government believes itself justified in the expectation that the conclusion of the agreement in question will open the way to a speedy return of the German property retained in the United States to its legal owners." (The document shows no reply)

The Mixed Claims Commission was established as the result of agreement executed August 10, 1922. (Treaty Series, No. 665, Government Printing Office, 1922). That agreement contained no method for the payment of the awards. (See, House Report No. 17, *supra*, p. 12)

While that Commission was engaged in its investigations, Germany went, in effect, "into the hands of a receiver, and the Allies were confronted with the task of collecting from a debtor unable to pay the total demands. The Dawes committee of experts was constituted to determine how Germany could pay and the annual payments which could be made . . . Although the United States was not a party to the agreement putting the Dawes plan into effect . . . it could support the Dawes plan and assist in making it successful . . . Accordingly, the United States was represented at the Paris conference which had been called for the purpose of determining upon a division of the payments to be made by Germany under the Dawes plan." (House Report No. 17, *supra*, pp. 12, 13)

The Dawes Plan was proposed April 9, 1924. The Paris Agreement was of January 14, 1925. (Included in document, *supra*, "American War Claims Against Germany.")

It would appear to be self-evident that the German foreign-office was in no position to assert claims on behalf of its nationals under such circumstances as—the financial collapse of its government, the "suitable provisions" clause in the Treaty of Berlin, the inability to meet awards of the Mixed Claims Commission. Nevertheless, after the adoption of the Dawes Plan and the Paris Agreement, the German Ambassador at Washington wrote Secretary of State Kellogg, with the suggestion that the Dawes Plan and the Paris Agreement made the "suitable provisions" and that the proper time had arrived for the return of property from the Alien Custodian. His letter was dated August 6, 1925 and Secretary Kellogg replied by letter of May 4, 1926 (See, document, *supra*, "American War Claims Against Germany", pp. 33 to 40 inclusive). Secretary Kellogg's letter concluded:

". . . The question of policy is, of course, separate and distinct from the question of law and, as appears above, has been reserved for determination by the Congress, which body, as Your Excellency is aware, is now considering that question."

At the time the Secretary replied to the Ambassador, *nine months* had elapsed, with his statement correct at the date of reply.

In fact, between December 7, 1925 and March 29, 1926, fifteen Bills were introduced in the House and nine in the Senate, before introduction of the "Mills Bill" onMarch 29, 1926 as expressing the views of the Ways and Means Committee. Hearings were held by that Committee from April 5 to May 5, 1926, and further hearings for ten days in November 1926.

On November 19, 1926 the petitioner's attorney, Frank W. Mondell, appeared before the Ways and Means Committee, speaking on behalf of German-claimants. He so stated and the Committee so understood.

At the Record in this case, page 31, mention is made of two documents, Exhibits "B" and "C", both of which were written by Messrs. Martin and Clark, and represent part of the services which they performed for us and for which they were compensated by the amounts of deductions here in dispute. The Exhibit "B" was introduced in the Senate as a Senate Document. Mr. Mondell himself presented the Exhibit "C" to the Ways and Means Committee on the date November 19, 1926 and the Exhibit "C" was printed by the Committee as a part of the hearings. It wil be found at pages 307 to 331 in Return of Alien Property-No. 4, Hearings before the Committee on Ways and Means, 1926, Government Printing Office.

At that same time, members of the Committee insisted that there also be printed with the hearings, a document which Mr. Mondell had compiled and had delivered in document form to members of the Committee. That document was entitled "Private Property in Time of War" and it appears at pages 293 to 307 in that same No. 4. The docu-

ment itself carried no name by way of authorship because, as Mr. Mondell told the Committee, he did not consider that he was an "author" because he merely arranged the writings of other persons.

The document Exhibit "C" was frankly described by Mr. Mondell to the Committee as containing views with which he agreed and which were favorable to the position of the German-claimants whom he represented.

If any Member of the Committee had deemed the fact as having the slightest importance or significance, he was free to question Mr. Mondell with regard to the connection between Messrs. Martin and Clark, and the petitioner. Nobody saw fit to do so, but would have been told if they inquired.

From the fact that the Exhibit "C" did not carry on the cover some such statement as "Printed and paid for by Textile Mills Securities Corporation, which publishes same as argument on behalf of German-claimants", the opinions of Judges Biggs and Clark find something "suspicious" or "sinister" in the publication.

To the contrary, it was presented to the Committee voluntarily by our attorney, the Committee could have had any information desired, and we had not the slightest reason for any form of concealment.

The very same document was printed as part of the hearings and was free for anybody in the public.

Furthermore, when we submitted the Exhibit "C" with the Stipulation, we did so for the purpose of showing the *kind* of work which Messrs. Clark and Martin performed for us. Both documents were legal treatises or briefs, showed the sources for all statements, and no more constituted "propaganda" than does this brief itself.

The Exhibit "B" dealt with matters from the historical aspect of former treaties; the Exhibit "C" dealt with the subject of the confiscation of former-enemy property in *peace-times*, the question before the Congress being whether it would *then* confiscate (1925-1928).

The Exhibit "B" was printed solely as a Senate Document. How far the Exhibit "C" was distributed publicly, we have no present means for knowing, but we believe the probability to be that it was distributed in the same identical way as Mr. Mondell's own write-up—mainly, to Members of Congress as a more convenient method of their reading (if they desired) than by reading the very same thing in small print *right within the printed record of the hearings*, presented to Congress by our own attorney.

There was not the slightest concealment on our part; nor was there any reason why we would desire to conceal. The bodies of both documents spoke for themselves, just as with any brief. Who wrote them and who paid the authors, were unimportant details that could not have the slightest effect upon the value of the legalistic analysis.

Why was it necessary that we utilize a "publicity organization" like that of Ivy Lee? Solely, wholly, and only because the American claimants were traveling in 1925 and 1926 the length and breadth of the Country, urging the confiscation of our principals' properties so as to supply the "suitable provisions" in satisfaction of claims by American-claimants against Germany. They asserted that the Dawes Plan and the Paris Agreement, following the complete collapse of Germany financially, did not make for "suitable provisions". They perceived as "the easiest way" the use of the seized properties in payment of their claims against Germany. Properly, in a recognition of the obligations under our contracts, we bore the additional expenses that the actions by the American-claimants necessitated. The American-claimants were the constituents of the Members of Congress; the German-claimants had nobody to whom they could address the justice of their cause—except to the Members of Congress through their contract-agents.

Every dollar of added expense came out of us, by force of our contracts. We had no reason for incurring expenses, except as we felt compelled to do so. An "Ivy Lee" never

would have been an event in this matter, except by the compulsion of the American-claimants.

And, may it be noted, the Commissioner agreed with us by the Stipulation that all of that was "necessitated". (R. 30)

## III.

### The Trading with the Enemy Act, in relation to the Settlement of War Claims Act.

The two Acts are so closely related as to necessitate discussion of the two Acts, for a fair understanding of the "new issues".

The first was an Act of deprivation, the second was an Act of restoration. The first was a war-measure, the second was a peace-measure resulting from the effects of war.

The Act of deprivation specifically recited;

> "After the end of the war any claims of any enemy . . . shall be settled as Congress shall direct."

That language embodied clear meanings and notices;

1. The negotiation of treaty should not attempt to include any agreements or concessions regarding the property seized. (That meaning again was emphasized in the Joint Resolution of July 2, 1921 whereby Congress declared the war terminated)

2. Nobody in Administrative departments should make any committment, because Congress had reserved complete control. (That meaning finds a recognition in the diplomatic correspondence cited in the previous subdivision of this brief)

3. The direction of a claim by an "enemy", either to the Judicial or the Administrative branch of our Government, would be wholly futile and ineffective, because they possessed no authority in the matter. (Again, we refer to the diplomatic correspondence)

4. "After the end of the war" Congress itself would entertain claims and would settle "as Congress shall direct".

As clearly as language could state the matter, we submit, the "enemies" were told—"Bring your claims here to Congress, after the war is ended, and not elsewhere. We will settle those claims as we see fit."

The Trading with the Enemy Act was not legislation for confiscation; it was for sequestration.

So declared Secretary Hughes. (See, letter to Dresel, August 20, 1921, *supra.*)

But, we will permit Congress itself to speak, starting our citations by the statement of Chairman Green when reporting the Bill that finally became the Settlement of War Claims Act.

In his Committee Report for the House Ways and Means Committee dealing with the Settlement of War Claims Act, (House Report No. 17, 70th Congress, 1st Session) Chairman Green states at pages 5 and 6:

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated *sequestration rather than confiscation.* The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner,' and in the so-called Chemical Foundation case[1] decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of the property under the authority of the Trading with the Enemy Act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.
>
> It is to be noted, however, that even if the property is held to have been confiscated, *in spite of the clear*

[1] *United States* v. *Chemical Foundation*, 272 U. S. 1.

> *intent of Congress to the contrary*, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the original owner but declare it to be held for the benefit of and for ultimate return to the original owner. . . . So that notwithstanding the undoubted power of Congress *to confiscate*, reaffirmed in the Chemical Foundation case, *Congress not only has refused to exercise that power up to the present time, but has clearly by legislation asserted its policy to be the very contrary of confiscation.*"

A similar attitude on the Senate-side is found in the report by Senator Smoot for his Committee (Senate Report No. 273, 70th Congress, 1st Session), where he states at page 2:

> ". . . Under the Knox-Porter peace resolution, which was incorporated in the treaty of Berlin, the United States unquestionably possesses the right to retain this property until Germany has made suitable provision for the satisfaction of the claims of American nationals against the German Government. *Unless, however, Congress is prepared to adopt a policy of confiscating the property of an enemy national* to pay the debts of his government some provision must be made for a more immediate return of this property."

Mr. Green said much to the same effect on the Floor of the House (Congressional Record, Vol. 68, Part 1, page 595):

> "At the last session of Congress there were in general two propositions for the disposition and settlement of these claims. The first involved a virtual *confiscation* of the property which was in the hands of the Alien Property Custodian and its application to the payment of the American claims. . . . I am quite sure that a great majority of the House are *against the confiscation of private property seized in time of war*, and believe that such property should ultimately be returned."

The foregoing quotations (italics being our addition for emphasis) comprise statements by the members who had

charge of the bill on each Floor, and both men were in Congress when the Trading with the Enemy Act was enacted. Many similar repetitions might be added showing the views of Congress itself, that the seizures had not been made as confiscations, but as sequestrations, and that a subject under discussion during debate on the Bill was whether confiscation should then occur *for the first time.* The above quotations range from December 1926 to February 1928.

Not only are those quotations confirmations of the position expressed in our contracts, but also statements made contemporaneous with the Trading with the Enemy Act, express the same sentiment.

When the Trading with the Enemy Act was under consideration in committee, Secretary Redfield spoke before the committee on May 29, 1917 as follows:

> "The creation of an alien property custodian is a novelty and is in line with that same effort toward equity which impels us to indicate an earnest desire to show to the people with whom, unfortunately, we are engaged in war that *here is the opposite of confiscation and here is the opposite of requisition.*" (Italics ours)

Again, on November 14, 1917, after the enactment of the Act on October 6, 1917, A. Mitchell Palmer, the Alien Property Custodian issued a statement through the Official Bulletin:

> "The purposes of Congress are to preserve enemy owned property in the United States from loss and to prevent every use of it which may be hostile and detrimental to the United States. . . . The Alien Property Custodian exercises the *authority of a common-law trustee;* there is *no thought of a confiscation* or dissipation of *property thus held in trust.*" (Italic ours)

The report of the Committee on Commerce (Report No. 113, 65th Congress, 1st Session) on the Bill, stated:

> ". . . Under the old rule warring nations did not respect the property rights of their enemies, but a more

> enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies *without confiscating it* . . . While the theory on which the bill is drafted is that enemy property shall be protected and utilized, *but not confiscated*, the ultimate disposition of the enemy property received and held by the Government is left to Congress, and provision is made that after the end of the war *enemy claims to such property* 'shall be settled as Congress shall direct.'" (Italics ours)

When Congress adopted Public Resolution No. 8 of July 9, 1921 that terminated the war, and which contained the provision to the effect that seized property would be retained "until such time as the Imperial German Government . . . shall have . . . made suitable provision for the satisfaction of all claims against said Government", Senator Knox, who had charge of the bill on the Floor stated (Cong. Rec. Vol. 61, Part 4, Page 3249):

> "The purpose of the joint resolution is simply to hold in status quo the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a suitable adjustment has been made of the claims of American citizens against Germany for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it . . . not that we are in any way committing ourselves to the proposition that we are going to retain alien enemy property, but that we are going to retain it only until suitable provision has been made for the satisfaction of American claims against Germany and against Austria."

By the Act of March 4, 1923, known as the Winslow Act, (42 Stat. 1511) provision was made for the return of property within certain limitations, and that Act also contained amendments to the Trading with the Enemy Act. A Section 23 was added to that Act, reading:

> "The Alien Property Custodian is directed to pay to the person entitled thereto, from and after the time

this section takes effect, the net income, dividends, interest, annuity, or other earnings, accruing and collected thereafter, *on any property or money held in trust for such person* by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian. . . ." (Italics ours)

It thus is made evident that when we engaged upon a contract with the claimants for "the return of the Claimant's property" as being "now held in trust for the Claimant by the Alien Property Custodian" (R. 33), we had the same attitude in the matter as had been expressed prior by Congress and which continued to be expressed thereafter by Congress, regardless of the statement in the *Chemical Foundation* case and with which statement members of Congress themselves disagreed.

The very term "confiscation" when speaking as something to be done thereafter (as is true throughout the debates on the Settlement of War Claims Act), necessarily recognizes the existence of legal rights and property interests within somebody other than the one who contemplates the confiscation.

Reverting to the situation in 1917, we quote from the Hearings before the House Committee on Interstate and Foreign Commerce, May 29, 1917:

"*Secretary Lansing:* The general purpose of the bill you have already stated, Mr. Chairman, that is, to stop commercial intercourse with the enemy. The basis of the bill is not, as it is in the case of the action that has been taken by the allied Governments, the nationality of the persons affected, but the domicile of the persons. We consider that the only trade that will materially aid Germany is that which reaches the German soil, and to prevent this is the purpose for which this bill is drawn. . . .

The balance of the act deals more particularly with its general application and how it will operate in the matter of continuing patents and the *sequestration* of enemy property in this country in order to carry out

the idea of complete non-intercourse with the enemy. (Italics added)

*The Chairman:* The letters that I have had on that subject criticize these provisions and charge something like confiscation. I have replied to all of them, stating that there is no such intent in the law, but merely to hold the property in doubtful cases, the whole thing to be adjusted after the war, and that there will be no final injury to anybody.

*Secretary Lansing:* Exactly. In fact, it is a protection, a very decided protection to the property owner, because enemy property is subject to seizure by act of Congress. . . ."

Over and over again, at the hearings on the bill, in the reports of Committees, and by statements in debate in House and Senate by members having the bill in charge, the statement was repeated,—that the bill intended sequestration as distinct from confiscation, that seizures contemplated protection to the owners as well as purposes related to the conduct of the war. Further quotations practically would mean a doubling of the contents by the entire Congressional Record, hearings, and Committee Reports, all of which clearly would evidence and would make more understandable the insistence by the members of the Congress dealing with the Settlement-Act, that confiscation was not intended by the Trading-Act,—regardless of the Chemical-Foundation decision.

The Settlement of War Claims Act comprised eleven sections by way of amendments to the Trading with the Enemy Act and nine sections by reason of inclusions relative to settlement of the claims of American-nationals and other matters relative to the compromise-agreement of the respective claimants on the two sides.

An Act of March 28, 1918 (40 Stat. L. 460) and an Act of November 4, 1918 (40 Stat. L. 1120) enlarged the powers of the Alien Property Custodian so as to authorize the sale of properties seized. Pursuant thereto, most of the seized properties were sold, the proceeds found investment

in bonds of our Government, and the final disposition of the "seized properties" by the Settlement-Act became a matter of a disposition relative to the converted properties in possession of the Alien Property Custodian in 1928.

Those converted properties (together with any original seizures that had not been sold) were accounted-for by the Custodian under the name of Trusts relative to the names of claimants. There were 16,000 such Trusts still active, in 1926 when the House Committee held its hearings. (See, testimony of Howard Sutherland, Alien Property Custodian, April 5, 1926, "Return of Alien Property," *supra*, pp. 71-103 therein).

The Settlement-Act dealt with the *properties within those Trusts*, limiting all claimants to the amounts therein, and barred any claim by them relative to a greater value being comprised within the properties as originally seized. The German-claimants accepted that solution of their claims (as the Settlement-Act provided) upon notifying the Custodian of their acceptance relative to the retention of 20 per cent of the amounts standing in their respective Trusts,—all as had been agreed to in the compromise-agreement signed by representatives of the two groups of the claimants. For the convenience of the Court we quote that agreement from page 129 of the Senate Hearings of January 13, 1927 (*supra*), directing attention to the admission of *ownership* relative to the Trusts as being in the German-nationals. The agreement provided:

"December 1, 1926.

Hon. William R. Green,
Chairman Ways and Means Committee,
House of Representatives.

Dear Mr. Green: For your information and that of your committee in drafting proposed legislation, we note the following as a general basis of agreement between the American and German interests which we respectively represent:

1. Twenty per cent of the alien property fund to be temporarily retained and so invested in Dawes plan an-

nuities as to become applicable to the immediate payment of American claims, the balance of the 80 per cent of the alien property fund to be promptly returned to the owners.

2. Fifty per cent of awards for payment of German ships, radio stations, patents, etc., to be likewise temporarily retained and applied to American claims as soon as it becomes available, and the balance of such awards distributed to ship owners, et al.

3. The $26,000,000, approximately, of unallocated interest in the hands of the Treasury to be similarly applied to American claims.

4. The $14,000,000, approximately, of Dawes plan payments received up to September, 1927, to be applied to the payment of American claims.

5. All funds in the hands of the Alien Property Custodian formerly belonging to the German Government, together with all funds so held the ownership of which is not disclosed within a period to be fixed in the bill, and thereafter established to be applied to the payment of American claims.

6. To the extent that the above payments on the American claims falls short of 80 per cent of the total amount of such claims, including interest thereon as awarded to January 1, 1927, the receipts from the Dawes plan payments accruing subsequent to September, 1927, to be first applied to payment thereof until such 80 per cent has been paid in full, and thereafter said receipts from the Dawes plan payments to be distributed ratably among the remaining unpaid claims of Americans, alien property claimants, and ship, radio, and patent claimants, together with 3½ per cent interest thereon, until they are paid in full; and thereafter these Dawes plan payments to be applied as they accrue to the payment of the $26,000,000 of unallocated interest advances as aforesaid, together with 3½ per cent interest thereon until paid, thereafter the Dawes plan payments to be applied to the payment of the United States Government awards against Germany.

WILLIAM P. SIDLEY,
*For the American Claimants.*

W. KIESSELBACH,
*For the German Claimants.*"

## IV.

**The Settlement of War Claims Act involved no element of "Favor Legislation," in distinction from "Debt Legislation."**

The opinion of Judge Biggs (R. 45, 46) deems our contracts to have been *void*, for the asserted reason that they sought "favor legislation" instead of "debt legislation", thus implying a validity to the contracts if they had sought "debt legislation". He admitted that he obtained that view from the decision of the Court of Appeals for the District of Columbia, in the case of *Brown* v. *Gesellschaft Fur Drahtlose Telegraphie M. B. H.*, 104 Fed. (2d) 227.

That case involved an attempt by a lawyer (who previously held connection with the office of the Alien Property Custodian) to recover his fees under a contract with one of the German nationals for the lawyer's services in connection with the Settlement Act. Under those facts, the court deemed the contract to be contrary to public policy and denied a recovery. (See first appeal of the case, reported in 78 Fed. (2d) 410.) The court might have quoted that passage in the Bible which declares that "no man can serve two masters", and have rested the decision upon that Authority. But, the court engaged upon *obiter dicta*, declaring that the German nationals never possessed any "lawful existing claim", sought "favor legislation", and therefore the contract was void anyway.

The petitioner cannot stand prejudiced by that *obiter dicta* through any failure by Brown's counsel properly to inform that court regarding the Settlement Act and the Trading Act, as we have endeavored to do in the foregoing subdivisions of our argument.

The utilization of the *Brown* decision conveys the implication that if the Settlement Act involved "debt legislation" the expenses quite properly would have been deductible; but, involving "favor legislation", they were not deductible.

Regarding the views of his colleague, Judge Maris stated (R. 67, 68):

"I have grave doubt of the soundness of the distinction thus drawn between 'favor legislation' and 'debt legislation'... The distinction sought to be drawn, as I understand it, is between legislation designed to provide for or facilitate the settlement of existing claims against the government and legislation which confers benefits upon individuals who had no claims against the government prior to its passage. This distinction seems to have been first expressed by the Court of Appeals of the District of Columbia in the first Brown case, supra. I do not find the distinction referred to in any decision of the Supreme Court of the United States. On the contrary the rule of that court seems to be to strike down such contracts as against public policy if it appears to the court that they are likely to facilitate and encourage the corruption of the legislative body. *Trist* v. *Child*, 88 U. S. 441. If this is the test, as I think it is, it would seem to follow that "debt legislation", since it is ordinarily devoid of general public interest and, therefore, not subject to public scrutiny during the process of enactment, would provide a much greater opportunity for legislation corruption than 'favor legislation' which ordinarily affects a larger section of the public and is, therefore, subject to much greater public attention while being considered by the legislative body . . . I am clear that in any event the validity of the contract has no bearing on the question before us, for reasons which will be discussed later. But even if its bearing be conceded it seems to me that the Settlement of War Claims Act was in fact "debt legislation".

We add to that clear analysis by Judge Maris with a question:—What is the difference between appealing to Congress for a "favor" of legislation, and appealing to Congress to appropriate money for the payment of a "debt",—as a favor?

People who possess *legal rights*, never have to seek an Act of Congress. They seek the desired result through the judicial processes.

It is only when they *lack* enforceable rights, that they seek the remedy from Congress. We make the bold assertion,—that there *never* is an Act of Congress which is *not* a favor, when special or specific.

"A *favor* is a *benefit* or *kindness* that one is glad to receive, but can not demand or claim, hence always indicating *good-will* or *regard* on the part of the person by whom it is conferred."
Funk & Wagnalls Standard Dictionary.

The "favor" element exists in every kind and description of special Act enacted by Congress. There is no exception whatsoever. Every time that Congress so expresses itself by legislation, *it is a favor*. What of it, if persons hold appointive offices? They cannot receive compensation, except as Congress acts by an appropriation measure. Nobody can compel Congress to do so. The payment of a "debt" is just as much a "favor", by the grace or blessing of Congress, as legislation which creates any appointive office or authorizes the appointment. The Sovereign cannot be compelled; its favor may be sought; every Act is a "favor".

We illustrate by the famous "French Spoliation Cases". The "debts" (if we grasp the court's distinction in the *Brown* case) were established by Court of Claims decisions decades ago. The obligations were recognized by our Government in the Treaty with France more than a century ago. Generation after generation of descendants of the original owners who were damaged, have passed into the Great Unknown. President after President (also now passed into that Great Unknown) has recommended to Congress that the "debts" be paid by enactment of the proper appropriation bills. The present generation of descendants still await the "favor legislation" that will pay those "debts". Congress, in 1885, instructed the Court of Claims to make the monetary determinations; that court rendered judgments from 1905 to 1916 totaling more than three million dollars,—which still stand unsatisfied. Mindful of that history and the fact that attorneys only can find compensation upon a contingent basis, it would appear far more difficult to obtain the "favor" of Congress for "debt legislation" (with the objections mentioned by Judge Maris) than for "favor legislation".

The Settlement Act was a matter of bestowing "favors" by all parties concerned: By the compromise agreement each side "favored" the other, and both "favored" the Members of Congress who frankly admitted by Committee report that the problem never could have been solved, except by the compromise;—and Congress "favored" everybody by enacting the agreement into an Act.

We do not question in the slightest degree, but that the Act was a "favor" from Congress,—by the very same token that *every* Act is a favor relative to the particular persons who gain benefits. (See, *Cummings* v. *Deutsche Bank*, 300 U. S. 115.)

The Act was a "favor" to the American claimants in a sense equal to the "favor" bestowed upon the German claimants.

The possession of a *claim* is quite different from a *legally enforceable claim*. As to the latter, no legislation is needed.

> "The term 'claim' is of course ambiguous, but it would seem that while the German interests had no 'property' in the confiscated items, they certainly had some moral ground for reimbursement." (Note on case below, Chicago Law Rev. Vol. 8, 779)

> "Adopting the norm of the judicially ideal business man by disallowing deductions wherever the enterprise does not meet some vague standard of public policy is an unwarranted change by judicial decision in the concept of taxable income. In addition, it burdens the courts, in construing taxing statutes, with all the archaic definitions of public policy evolved in contract law. Cf. Helvering v. Hallock, 309 U. S. 106." (Note on case below, 54 Harvard Law Rev. 699)

"Favor legislation" might be deemed as a grant by a Sovereign through legislative action, in a situation where there was no semblance of a claim, no reasonable basis for asserting a claim, no excuse whatsoever for alleging damage or loss if the legislation were denied.

Where, however, a person has made investment in a foreign country and is deprived of that property by a Sover-

eign action, it is beyond comprehension that he has no right to ask that Sovereign to make a restitution. Such a right, when addressed to the Sovereign, *is a claim*, even though the decision may rest with the Sovereign's discretion or free will, as distinct from a legally enforceable right. From the time of seizure in Germany, our citizens possessed a claim *against Germany;* equally, the Germans had a claim against us, for the seizure of their property.

The very Act that authorized the seizure recognized that claims would be created with the seizures. The Joint Resolution of July 2, 1921 recognized the existence of claims, by the very language that insisted upon a *retention* until "suitable provision" was made by Germany for the seizure of the properties of our citizens. The Settlement Act recognized *the existence of claims*, because its whole purpose was,—*the settlement of claims.*

We assert, therefore, that the decision in the *Brown* case, *supra*, and the opinion by Judge Biggs in the court below, were predicated in error upon the non-existence of claims. Should it not suffice that Congress itself recognized the representatives of the two groups of "claimants" and enacted into law *their compromise agreement?*

The First Amendment to the Constitution declares:

> "Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances."

There are certain matters where a direct contact (and expenses) as between private persons and members of Congress is permissible and essential. The American claimants had "grievances" and the German claimants had their "grievances", but the foreigners necessarily had to present their "grievances" through representatives in the United States. What the Commissioner sees fit to call "legislation" (when applying the Article 262 of Regulations 74) and the court in the *Brown* case, *supra*, calls "legislation", (the opinion by Judge Biggs as well) was nothing but a Congressional approval for a settlement of the grievances

in terms of a compromise agreement as between the respective petitioners who had presented their grievances,—to Congress, as their Constitutional right. In a truer sense, the Settlement Act was *special legislation*, more fittingly to be described as *quasi-judicial* because it merely approved the settlement agreement between the two groups of aggrieved claimants.

Special legislation, inevitably, must *favor* the persons for whose special benefit the Act is enacted. Those persons alone can advocate the enactment, and they alone can contact the members of the legislative body.

Principles of law which might be applicable, on grounds of public policy, to matters of *general* legislation involving the public interest as distinguished from the interest of particular groups, have no application, we submit, to the situation in this case,—of such peculiar facts in relation to *special* legislation.

## V.

### The fact of contingent contracts did not make those contracts void or illegal, as being against public policy.

Under Part 1 of our Argument, we explained the necessities for contingent contracts in this matter. The Germans had no other means for compensating us, except relative to what they might recover from the properties in possession of the Alien Property Custodian,—if the legislation resulted.

Contingent contracts may be *an unfortunate necessity* (from the agent's viewpoint) but they are not "sinister" *ipso facto* and without opportunity for an explanation. "Improper influence" may just as easily be exerted through substantial flat payments in advance of the services to be rendered, as under contingent contract arrangements. If the principal and agent are dishonest, unconscionable, unethical, and criminal-minded, the advance payments easily may exceed proper compensation for the services and contemplate by such excess an improper use of the money. The

mere *form* of contract cannot be a guaranty as to honorable conduct. Such conduct comes from the *soul*, not from the pocketbook.

In *Steele* v. *Drummond*, 275 U. S. 199, this Court stated (when holding that the contract there involved was not void as against public policy):

> "'All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice.' While the principle is readily understood, its right application is often a matter of much delicacy. It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. And it is a matter of great public concern that freedom of contract be not lightly interfered with. . . . The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. . . . It is only in clear cases that contracts will be held void. The principle must be cautiously applied to guard against confusion and injustice. . . . Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated." (Decision unanimous; omissions represent citations)

In *Valdes* v. *Larrinaga*, 233 U. S. 705, a unanimous court held the contract there involved (which, incidently, made compensation contingent upon the result), not void as against public policy, Mr. Justice Holmes stating, in part:

> "But we discover nothing in the language of the letters that necessarily imports, or even persuasively suggests, any improper intent or dangerous tendency."

In *Spalding* v. *Mason*, 161 U. S. 375, a contract for sharing fees under some 7,500 claims that were established by

an Act of Congress through the services of an attorney upon a contingent basis, was enforced by this Court.

In *Winton* v. *Amos*, 255 U. S. 373, recovery was recognized on a *quantum meruit* basis for services in procuring an Act of Congress beneficial to Indians, although the written contracts with the Indians were invalid by reason of their lack of power to contract. The Court stated, in part, at page 393:

> "We have no doubt that, for proper professional services in promoting legislation that has for its object and effect the rescue of substantial property interests for a class of beneficiaries under a trust of a public nature, it is equitable to impose a charge for reimbursement and compensation upon the interests of those beneficiaries who receive the benefit, the same as if a like result had been reached through successful litigation in the courts."

In *Nutt* v. *Knut*, 200 U. S. 12, a contingent contract for the procurement of an Act of Congress was enforced as not contrary to public policy.

The decision in *Steel* v. *Drummond*, *supra*, more recently has found approval by this Court in *Twin City Pipe Line Co.* v. *Harding Glass Co.*, 283 U. S. 353, at 356, 357; and *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38; 85 Law. Ed. 383, at 387 (See, Note on that case, 50 Yale Law Journal 1108).

The court, in the *Brown* case, *supra*, makes no mention of the case of *Steele* v. *Drummond*, *supra*.

In the court-below (R. 46) the attempt was made by one of the adverse opinions to distinguish the case of *Steele* v. *Drummond*, *supra*, from the case at bar, for the reason that Drummond had a "property interest" in the matter of legislation, separate from his contract obligation. It is impossible for us to perceive how there could be *less* of a tendency for "improper influence" in a situation where a man held the additional interest of ownership-plus-contract, than where he held a contract-obligation *without* an ownership

It seems to us, rather, that such decisions as hold for a violation of the public policy rule, tend more to resemble such situations as shown in the recent case of *Ewing* v. *National Airport Corp.*, 115 Fed. (2d) 859,—relative to which this Court denied Certiorari on March 31, 1941. The contract there involved, expressly contemplated the use of political influence in obtaining legislation from Congress upon a contingent fee basis, and was performed by promising members of Congress his political help in their election districts, in return for their support by voting for his Bill. The court stated:

> ". . . no court will lend its assistance in anyway toward carrying out the terms of an illegal contract; that a contract to secure the passage of legislation by any other means than the use of reason and presentation of facts, making arguments and submitting them orally or in writing, is invalid as a 'lobbying contract'."

The situation in that case was much the same as in the leading case of *Trist* v. *Child*, 21 Wall. 441, relative to the kinds of contracts which *will or will not* be enforced. Both were instances of personal solicitation of legislators, with a complete absence of an appeal to reason or fair-argument, and with an exertion of improper influence.

On the general subject, we refer to Restatement of the Law, 17 Corpus Juris Secundum, "Contracts", Section 213.

We suggest application to the facts of the case at bar, of the statement in *Trist* v. *Child*, *supra*, regarding *enforceable* contracts:

> "We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included: drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on

> the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable."

We agree also with the high standard of morality, as set forth in the opinion of Mr. Justice Swayne (pp. 451, 452) in that case.

We submit the Record as showing that our conduct met every requirement of the standard.

A very clear evidence either of carelessness or plain oversight, is submerged in the adverse opinions of the court below. That comes to light in the opinion of Judge Clark by way of a dissent in the case of *Girard Trust Company* v. *Commissioner*, 121 Fed. (2) ...., decided in the Third Circuit on June 27, 1941, where he describes the case of *this petitioner* as:

> "the secret influence type".

The Exhibits B and C were presented to Congress by us, —one being accepted and printed as a Senate Document, the other being presented to the Ways and Means Committee by our own attorney and printed as part of the hearings by the Committee itself. What was "secret" about it? Both in the Senate and the Committee, if any Member of Congress considered that *who paid for the work* evidenced in those documents, was of the slightest importance, questions could have been asked and they would have been answered. The very fact that the documents presented data *against confiscation*, showed clearly enough that the American-claimants (who were seeking confiscation) had nothing to do with those documents, and there was only one other interested party, namely,—those who opposed confiscation, the German-claimants.

It equally is true of the work of "Ivy Lee", in the campaign of education. Should American newspapers and magazines accept and print *only* the advocacy of the *American*-claimants for *confiscation?* Should the American people be kept in complete ignorance with regard to the continuous

policy of our Nation back to the time of the Revolution for our independence, when the *Tories* were compensated for the seizure of their property during that war? Should they be kept ignorant of the fact that the same policy had continued throughout every other war? Should they be kept ignorant of provisions in treaties that had recognized that same policy? In such ignorance, should they "write your congressman urging confiscation", in response to the plea by the American-claimants? Should the congressmen, overwhelmed by such ignorant insistance from constituents, be forced to express that ignorance, without their own free will? Were not the congressmen entitled to know the truth, as to our policy, so that they might set their constituents into the paths of truth?

Work along those lines relative to the expenses here in question, *is all that we did.* The work was educational, but it had nothing whatsoever to do with "the secret influence type".

Upon the completion of that education regarding our past policy, it became a matter solely for the *free choice of Congress*, either to maintain that policy or to break the chain, and to order confiscation.

That confiscation would have been a bad policy, needs little comment. No foreigner thereafter would invest in the United States and the investment of our citizens in foreign countries would have had no assurance for safety. What we had done, they could do,—confiscate.

## VI.

### An unenforceable contract is not illegal in a sense of being criminal.

The principle that contracts in contravention of public policy will not be enforced through judicial processes, is based upon the maxims, *Ex dolo malo non oritur actio*, and *In pari delicto potior est conditio defendentis.*

As expressed in *Trist* v. *Child, supra;* "Where there is turpitude, the law will help neither party."

Where such contracts have been *executed*, the fact of "illegality" cannot cause a utilization of the courts for a restitution. It is a two-edged sword that denies judicial redress completely. (See, Restatement of the Law, 17 Corpus Juris Secundum, "Contracts", Section 272 et seq.)

Yet, the opinions in this case by Judges Biggs and Clark (R. 42-66) dealt with a matter of *unenforceability*, in terms of the equivalent of *malum prohibitum* or a violation of positive statutes—and thus, criminal in nature. (Or was it *malum per se?*)

A disallowance of a deduction in the ascertainment of taxable income by predication upon the unenforceability of a contract, would carry into such extreme confusion as to merit the most careful consideration by this Court. The identical language of a contract may be deemed enforceable in one State, but unenforceable in another. In one State the business may be "legal", in another "illegal". The decisions in various States are so variant with regard to the dictates of "public policy" as to provide no norm for reason and action.

We can state that phase of this case no better than by quoting from 8 Chicago Law Review, at 778, with relation to Note on the decision by the court-below in the case at bar:

> "Also, in the instant case, it was said that the deduction could not be allowed because the expenditure was made in pursuance of a contract which was itself contrary to public policy . . . Not only may the use of this argument be criticized on the ground that refusal of the deduction is not a proper means of enforcing the policy, but it may also be objected to because it is not at all clear that the contract was against public policy. If, under *Erie* v. *Tompkins*, state law is applicable . . . the federal courts are faced with a variety of state decisions, . . . some of them holding that contingent fee contracts for lobbying are void, . . . others holding that the contracts are valid unless there is proof that improper acts were actually contemplated or done . . . Under the federal decisions, there is an equal lack of uniformity . . . Usually, where there has been personal contact with individual legislators, the contract is held void. Yet in one case the court allowed quasi-contractual relief to lobbyists for the Choctaw Indians in spite

> of the fact that the claimants engaged in all types of lobbying activity, including personal solicitation . . . If personal solicitation does not render the contract void, it would seem that, a fortiori, a contract for the type of activity involved in the instant case would be enforcible." (Citations omitted)

Equally pertinent to this phase of the discussion is the Note relative to the decision by the court-below in the case at bar, in 54 Harvard Law Review, at 859, 860;

> ". . . justification of disallowances on grounds of effectuating public policy must overcome both the contrary import of the statutory language . . . and the countervailing policy against judicial conversion of a tax on net income into a possibly exorbitant tax on gross receipts . . . In addition, the extension from the concept of illegality arising from criminal and regulatory statutes to the concept of effectuation of public policy involves the acceptance en masse of all the artificiality such a vague standard must necessarily contain . . . The negligible relation of such a standard to the determination of what the tax burden of an individual taxpayer should be indicates that even though the restricted concept of illegality be retained, the broad concept of effectuating public policy should be discarded. To do so will, of course, result in the loss of haphazard additions to the national revenue. But increases in revenue should come either from an extension of tax liability or from an increase in rates, rather than from the distortion of a relatively rational system of taxation." (Citations omitted)

An examination of decisions in various States regarding public policy, makes evident that some jurisdictions hold so little confidence in the ability of their legislators to withstand or repulse "improper influence", that the courts feel compelled to enfold the legislators within a protecting mantle; other jurisdictions express a greater degree of confidence in the integrity of their legislators, or their ability *not* to be improperly influenced, that more lenient standards are expressed relative to "public policy".

Projecting such divergent views onto the "screen" to picture Taxation, can add chaos to an already existing confusion.

## VII.

**The determination of net income in an illegal business should be by the same standards as for a legal business.**

The position of the Commissioner and of the two adverse opinions is that illegal businesses should be taxed upon their gross receipts as "net income." Presumably, that position finds interpretation of the revenue acts into a meaning by Congress that the deduction for expenses applies only to carrying on a "legal" business.

The revenue acts always have said "in carrying on *any trade or business.*" Now, it is advanced, the language should be changed (without an Act of Congress) into "any *legal* trade or business."

For the twenty-eight years of interpretation by Regulations, no such interpretation ever has been made. Not even can "the reenactment rule" find an invocation. (It is hoped that we will not now be troubled by a new creation as, "the non-enactment rule.")

We have not been able to locate any precedent for the proposition that in an illegal business the "net income" is the gross receipts.

Nor (except for the case at bar) can we find any case where the Commissioner has urged the contention—unless *Steinberg* v. *United States*, 14 Fed. (2d) 564, represents such an attempt, with a repudiation of the doctrine by the Second Circuit.[1]

*United States* v. *Sullivan*, 274 U. S. 259, involved an instance where this Court held that taxation could not be evaded by an argument that the business was illegal. This Court did not rule upon the question how the taxable net income should be determined. In the opinion, this Court said:

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[1] See, however, varying aspects of the matter in, *Alexandria Gravel Co. Inc.* v. *Commissioner*, 95 Fed. 2d 615; *Sullivan* v. *United States*, 15 Fed. 2d 809; *Helvering* v. *Hampton*, 79 Fed. 2d 358; *McKenna* v. *Commissioner*, 1 B. T. A. 326; *Frey* v. *Commissioner*, 7 B. T. A. 338; *Terrell* v. *Commissioner*, 7 B. T. A. 773; also, *Bureau Ruling, IT 2175*, Cum. Bul. IV-1-141; and *Bureau Ruling, S.M. 1078*, Cum. Bul. V-1-226 (cited with approval in *Kornhauser* v. *United States*, 276 U. S. 145, 153).

> "It is urged that if a return were made the defendant would be entitled to deduct illegal expenses such as bribery. This by no means follows but it will be time enough to consider the question when a taxpayer has the temerity to raise it."

We understand that this Court meant that if any taxpayer desires to admit the commission of a *second* crime, and claim as deduction the expenses of that other crime as against receipts from the commission of the *first* crime, "it will be time enough to consider the question" when such an admission is made to the Court. In other words, the case itself did not involve the ascertainment of liability for taxes (it was a criminal prosecution for failure to file a return); if a proper case were presented, the Court would consider the contentions—"temerity," because a different crime thus would have to be admitted, opening the culprit to another criminal prosecution under state laws.

There are instances where a taxpayer is engaged upon a certain business which could be conducted without the commission of any crime, but laws are violated, prosecutions result, and money is expended in defense (unsuccessfully). Such expense is not deductible, *because crime was not the business*. Without doubt, such cases as *Burroughs Building Material Co.* v. *Commissioner*, 47 Fed. (2d) 178, (which apply to that exact situation) will be cited by the Government in this case.

For the convenience of this Court, we refer to a complete citation of all such decisions, with comments relative thereto, in Note, 54 Harvard Law Review 852. For the reason that the analysis by that Note is so complete, our reference thereto avoids a repetition of discussion in this brief.

It impresses us that the question has far greater importance relative to a reasonable application of tax laws, than relative to "catching" somebody with taxes by a technicality. When the Government requires revenue, it is a most simple process to produce the result by increases in rates. (The rates under existing revenue laws are more than *double*, by comparison with rates during the First World War.)

If such a doctrine found encouragement as "violation of law deprives of deductions," the tax controversies would find increase by the tens of thousands (a most conservative estimate).

In our vast country there are countless numbers of people who gain their livelihood "by taking chances." In a sense, all business undertakings are "chances," and the professional gambler deems that he is just as much "in business" as "the other fellow." Without it, he would starve.

Among our forty-eight states there are varying views pertaining to what is, or is not, a lawful business. Liquor can be sold in some states, not in others. Cigarettes can be sold in most states, not in some. Betting on horse racing (and dog racing) is legal in some states, not in others.

Selling this and that is legal in some states, illegal in others. Operating theatres is controlled in various states in different ways, making for one thing as legal, another as illegal. Wages and hours acts, employment of women after certain hours, child labor, sanitary or health provisions, operating a business in violation of the rights of others relative to patents, trademarks, trade names, or unfair methods of competition, operating without a license under supervised situations relative to police powers, even operating hotels in certain states in violation of statutes relative to the length of beds, the length of sheets, or the number of blankets may violate state laws; charging a prohibited rate of interest on loans, and so on *ad infinitum;* there is no limit to the possibilities relative to operations of *business* in violation of law—*mala prohibita*, not merely against an uncertain "public policy."

When one engages upon the problem of determining the deductibility of an expense by the validity of the business operation, it would not be a matter of ascertaining the "net income" in terms of "gains, profit, or income"; it would be a matter of taxing the *gross receipts* as a penalty for a violation of some state law in a major or minor respect. It would not find excuse by the "ability to pay" doctrine. Let us picture a race track gambler "following the horses"

from Santa Anita to Saratoga, betting wherever he goes, regardless of state laws, pari mutuels, or otherwise. He pays for "tips"; he pays his traveling expenses—all in a hope for gain in the *only* business that he has. By his gains he lives, he profits, or he loses. As he travels, his bets may be legal in one state, illegal in another. From the Federal aspect, what is his "ability to pay taxes," to share the burden of our Government? Must we differentiate his operations between those states where betting is legal and those where it is illegal? Let us picture a manufacturer of liquor, shipping the product into one state where the sale is legal, into another where it is illegal. Does he have *greater* "ability to pay taxes" because of the illegal sales and a nondeductibility as to expenses proportionate thereto?

Equally, it might be said that it is not "ordinary and necessary" for a business to operate in violation of the Wages and Hours Act, employing women at night, child labor, and by disregard of numerous other restrictions. But, is the "ability to pay" taxes *increased* by denial of deductions relative to the illegal operations?

Gambling establishments may be licensed in one state, not in another. By the invocation of such a doctrine, one would be taxed on "net income," the other on gross receipts (theorized into being "income, gains, or profits"). Houses of prostitution are licensed in some states, not in others.

A licensed status might fail for nonperformance of a specified condition. The *state* does not prosecute, but some revenue agent makes his private investigation and "finds" the operation to have been illegal.

If any such doctrine applied, *every situation of taxes* would involve an ascertainment whether, here or there, some Federal law, state law, city ordinance, or license had been violated in the course of the business operation. Every tax case would be converted into a criminal prosecution.

That the matter already has reached enough of a state of confusion, see Note, 54 Harvard Law Review 852-860.

We refer also to Comments by Judge Maris (R. 70) where he opens his analysis by saying:

> "It seems to me that the majority by this decision are converting into a penal statute what was intended by Congress to be solely a revenue measure."

But, it does *more* than that. It permits the Federal Government to exact a penalty for violation of some *state* law, city ordinance, or license, even though no prosecution occurred in the state or municipality. We thought we were progressing out of such realms by the decision in *Erie Railroad* v. *Tompkins*, 304 U. S. 64.

Our foregoing discussion relates to *malum prohibitum*—enough of a task in itself for prosecuting officials, without embarking revenue agents into that field.

The case at bar, however, as alleging to involve contracts "void because against public policy" injects us more into the field of *malum per se*, or the Common Law.

With states holding such contrary views regarding "public policy," we anticipate the bewilderment of revenue agents, attempting to ascertain taxes relative to how some state court *should* determine the "public policy" of that state as a means for the Federal Government to collect *penalties*.

## VIII.

### General Comments Regarding Ordinary and Necessary Expenses.

When expressing the unanimous opinion of this Court in *Welch* v. *Helvering*, 290 U. S. 111, Mr. Justice Cardozo described the term "ordinary" as (pages 113, 114):

> "a variable affected by time and place and circumstances."

Later in the opinion in that case he stated (pages 114, 115):

> "Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and

> not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life, in all its fullness must supply the answer to the riddle."

Mr. Justice Holmes stated the general subject-matter in *Schenck* v. *United States*, 249 U. S. 47, 52:

> "the character of every act depends upon the circumstances in which it is done."

Again, did he state in *Towne* v. *Eisner*, 245 U. S. 418, 425:

> "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

The same thought was expressed in *Deputy* v. *du Pont*,[1] 308 U. S. 488, 495, 496, by Mr. Justice Douglas:

> "the fact that a particular expense would be an ordinary or common one in the course of one business and so deductible under Section 23(a) does not necessarily make it such in connection with another business . . . One of the extremely relevant circumstances is the nature and scope of the particular business out of which the expense in question accrued."

Applicable to the case at bar, it was both "ordinary and necessary" in the business upon which we were engaged by contracts, to protect the interests of our principals by preventing the confiscation of the property and its use in payment of the American-claimants. We were entitled to do so by every fair form of an appeal to reason, directly to Members of Congress and indirectly to them through their constituents. We were entitled to present the side of the German-nationals, who had expressed faith and confidence in our country by investing here. Their only argument was a *plea*, through us as their representative. We

[1] See, Annotations to that case in 84 Lawyers Ed. 416, at 426.

were fully aware that Congress *could* order a confiscation. The decisive question was, whether Congress *desired* to do so if informed that the policy of the United States throughout our entire history had been consistent against confiscation of enemy property. How would Congress and the American constituents *know* of that policy, unless somebody collected the data? Who could or would collect it and print it and distribute it, except the representatives of those German-claimants? Clearly, the *American*-claimants would not do so; their only interest was in the payment of their claims. We had to do it, and to bear the expense.

The material which we supplied was in every sense fair and was historically accurate. We were assisting Congress to a correct decision, in a sense equal to assisting our principals.

When the performance of contracts *is the business*, it is ordinary, usual, or customary for that business to perform the contracts, and to incur expense in such performance.

Not only was the "necessity" a fact, but also the Commissioner admitted the necessity for the expense by the Stipulation.

One of the adverse opinions in the court-below, at R. 47, 48, enunciates such an unusual and original theory, without citation of any precedent in support thereof, that we comment only briefly.

The idea is advanced for the first time in the history of income-taxation, that an expense is not "necessary" unless a taxpayer proves that the expense caused the result that was intended by the expense. Applicable to the Settlement Act, it is stated that the expense was not "necessary" unless we proved that the Act resulted because of the expense.

Previous to that statement, the interpretation of "necessary" always has been in the sense of "helpful", rather than by proximate causation. Obviously, if it were essential to establish the deduction by "proximate cause", there never could be such proof and the language of deduction

would be an absolute nullity. How can a merchant or a manufacturer *prove* that expense for advertising, repairs, salaries, wages, or for anything else, was the "proximate cause" of the gross receipts?

We submit the comments by Judge Maris (R. 71, 72) as disposing of the idea convincingly.

The Committee Report of Chairman Green and his statements to the House (both *supra*) shows that "the proximate cause" of the legislation was the compromise-agreement signed or approved by the two respective groups of claimants. But, what was "the proximate cause" of the *agreement?* Very obviously, when the American-claimants perceived that Congress did not favor confiscation, a compromise became possible.

The expenses in question were *an element* in the process of reaching "the proximate cause" of the legislation. As such an element, they were both "ordinary and necessary", —and the Commissioner so agreed when the case stood within the jurisdiction of the Board of Tax Appeals.

We approve and adopt as part of our argument in this regard, the analysis and reasoning by Judge Maris, Record 68 to 72 inclusive, which we quote in part;

> "Section 7 of the Trading with the Enemy Act . . . . clearly contemplated that the former owners had claims which would have to be dealt with after the war . . . . . Here was not only the recognition of the existence of claims on the part of the former owners of seized property but also a clearly implied invitation to them to solicit from Congress legislation providing for the settlement of their claims . . . . . Even though the taxpayer's contract was void . . . . it does not follow that the expenses paid in carrying out the agency constituted by the contract were not ordinary business expenses. The illegality suggested is as to the manner of compensation and not as to the result sought to be accomplished . . . . The fact remains that the business contemplated by the contract was carried through, the contingent compensation was paid and is now being taxed, and the expenditures here sought to be deducted were expended in carrying on that business and earning that compensa-

tion. The alleged invalidity of the contract obviously does not affect the taxability of the income and I see no basis for holding that it affects the deductibility of the expenses . . . .

. . . . It is wholly beside the point to consider whether such expenditures would be ordinary in business generally. It is doubtless true that expenditures for lobbying activities were not ordinary in the case of persons engaged in mining, manufacturing or commercial business, but here lobbying was not merely incidental to the taxpayer's business but itself constituted the business. . . .

. . . . The majority have placed the stamp of illegality upon conduct which Congress has never declared to be criminal. I think that in thus restricting the plain language of the act this court is exercising a legislative and not a judicial function. I cannot agree that we have such power . . . ."

Regarding the closing part quoted above, we again refer to "The Struggle for Judicial Supremacy", *supra*, and the criticisms of courts for invading the field of legislation.

# ARGUMENT

## Part 3. The Court En Banc

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The opinion of Judge Biggs (R. 50-58) argues the affirmative of the question. For the assistance of this Court on such a new matter that previously has not been considered by this Court, we adopt the negative side of the argument.

Relative to the particular case at bar, we direct attention to the opinion-below (R. 58);

> ". . . Where, however, there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other three judges of the court, it is advisable that the whole court have the opportunity, if it thinks necessary, to hear and decide the question . . ."

When this case was argued before the court of five judges, counsel was not informed that three of the judges desired to reverse the Board upon issues that were not presented to the Board, and that two judges felt that the case should be decided on the issue that *was* presented and decided by the Board. There was no suggestion that we argue the new issues.

We assumed, innocently and properly, that "the important question" related to the construction and effect of the Regulation, justifying consideration by five judges instead of the statutory three judges, so as to prevent possibly conflicting decisions in the future for that Circuit with regard to that question,—namely, the application of "the reenactment rule."

Three out of the five judges did agree with the Board on that issue. Our confidence in the soundness of the Board decision thus was sustained, as evidencing why we raised no objection to five judges instead of three. But, relative to the original court of three judges (Biggs, Clark, and Maris) the majority of two (Biggs and Clark) just as easily could have decided *on those new issues* (disregarding the

issue in the Board and the facts found by the Board), without the addition of Judge Jones, to the side of Judges Biggs and Clark, and of Judge Goodrich, to the side of Judge Maris.

It might have been more embarrassing to have separate opinions by each of the *three* judges, one judge agreeing with the other two respectively, as to the issue before the Board (in one instance) and as to the new issues (in the other instance). In that situation, it might have been more difficult to order a Judgment of Reversal. The addition of one judge on each side made that result easier,—by a five judge court with two judges only concurring as to *two* out of the three opinions.

With that record before us *in the first case* that raises the question of the validity of a court *en banc*, we list objections to that procedure (not intending by a numerical order to stress the relative importance of the objections).

1. Just as Congress by the Act of 1925 relieved the Supreme Court from the burden of considering cases, by the abolishment of direct appeals in most cases and confining cases to the discretion of this Court through the grant of Writs of Certiorari, Congress in the future (controlled by a different political party) could "relieve" this Court by confining the jurisdiction to constitutional questions (or otherwise), thus making most decisions by circuit courts of appeal final and conclusive. Just as the number of circuit judges has been increased by various Acts in the past, so they could be further increased in order to supply majorities in each circuit that would reduce the present incumbents into position of ineffective minorities (through courts *en banc*). We thus would experience a *true* "court packing plan," for reasons which it would be difficult, if not impossible, to refute. With the constitutionality of the Act of 1925 unquestioned, there is practically no limit to legislation for additional "relief" for this Court.

2. By the various Acts of Congress the appointment of additional judges has been authorized for respective cir-

cuits, on the ground that "the court" must sit as *three* judges, and that the volume of work required additional judges so that, by sitting in rotation, courts of *three* judges could keep the dockets more current. If all the judges of a circuit consider cases as courts *en banc*, either there are too many judges in that circuit or their ability to perform their duties in three-judges courts will be hampered. If four, five, six, and seven judges are called on to do the work of *three* judges, Congress readily can perceive that "there's something wrong in the State of Denmark." The most obvious answer will be, either to transfer them elsewhere to a circuit or district court where the docket is congested, or to abolish "the excess baggage."

3. The validation of courts *en banc* means, as a practical matter, that every judge will have to concern himself *with every case*, either before a hearing by a three-judges court or after such hearing by a three-judges court in which he did not participate. The greater the number of appointed-judges in a circuit, in that degree is the necessity for such scrutiny increased. View the circuits of *seven* judges; the four who do not sit on a three-judges court are the majority in those circuits. Those three judges easily could hold a unanimous opinion, but if the other four considered the questions they would be unanimous the other-way. If no judge dissents in the three-judges court, how is the majority to be informed, except by the necessity to study and scrutinize every record and every decision? The same is true in circuits with six judges. There, opposite opinions by two sets of three judges, would have to find a majority solution by obtaining "the attendance" of the Circuit Justice assigned to that circuit, so as to make the court *en banc* comprise seven votes. The need for every judge to concern himself with every case on the docket, equally would pertain to the circuits having five circuit judges, and even to four; adding the presence of the Circuit Justice in the latter instance would supply the necessary majority as against an otherwise "hung jury" of the four judges.

4. If the addition of judges without changing the provision in the Judicial Code relative to three judges, means that the "circuit court" comprises all of the appointed judges (as the opinion-below argues) in a judicial circuit, then "The Circuit Court of Appeals for the Third Circuit" means that *all cases* shall be considered *by five judges*. If that were true, the inquiry is proper:—How could Congress expect to clear dockets quicker by five judges courts than by three-judges courts?

5. If "three judges" in the Judicial Code, means five judges in the Third Circuit and seven judges in the Ninth Circuit (and so on), then when Congress grants an appeal or review by "the circuit court of appeals" in any taxpayer's judicial circuit, it means that *five* judges must consider every case in the Third Circuit, seven in the Ninth Circuit, and so on. We contemplate with awe, the thousands upon thousands of cases that improperly have been decided!

6. Each Justice of this Court is a "Circuit Justice" designated to a judicial circuit, and is a member of the circuit court of that circuit "when in attendance." Thus, he is one of the *three* judges who sits as a circuit court of appeals. In other words, if the argument by opinion-below were correct, the court of the Third Circuit is not *three* judges, but five circuit judges *and a Circuit Justice*. If any question is so important as to require consideration by a "full court" of five judges, why is it not important enough to require attendance by "*the* full court" of six judicial appointments? Answer; if Mr. Justice Roberts, as the Circuit Justice in the Third Circuit, had been informed that the "importance" of the questions in this case required his attendance, his *possible* agreement with Judges Maris and Goodrich would have meant a divided court,—and affirmance of the Board decision. Thus, a court *en banc* would have accomplished nothing. We do not mean by that, that the non-attendance of Mr. Justice Roberts was intentional in our case. We mean rather, that if a court *en banc* means

all persons who are qualified to be members, then in the Third Circuit (and all other circuits having odd numbers of circuit judges) no majority action can be assured. Whereas, in the kind of court provided by the Judicial Code (three judges) a majority action *always is assured.*

*i.* The Judicial Code not only provides in Section 117 for a court of three judges, but also specifies "of whom two shall constitute a quorum." There is no provision that a *majority* shall constitute a quorum. So, we note, that when the Third Circuit amended its rules to validate a court *en banc*, it recognized the Judicial Code in one respect at least; —"Two judges shall constitute a quorum," even for a court *en banc.* In that regard, let us now examine Section 120 of the Judicial Code;

> ". . . In case *the full court* at any time shall not be made up by the attendance of the Chief Justice or the associate justice, and the circuit judges, *one or more district judges* within the circuit shall sit in the court according to such order or provision *among the district judges* as either by general or particular assignments shall be designated by the court . . ." (Italics added)

Section 120 speaks of "the full court" as being in terms of the *three* judges previously specified in Section 117. Yet, if "the full court" means five or six judges in the Third Circuit, the district judges must be called upon to fill vacancies. Thus, by disqualification or illness of a circuit judge, the work of the district courts must be hampered by calls to sit in courts *en banc,*—noting, all this time, that "two judges shall constitute a quorum."

8. Whether a decision in a circuit court be two-to-one, three-to-two, or four-to-three, it always must be a difference *by one man's views,* and the objections to five-to-four decisions in this Court equally are pertinent. A four-to-three decision is closer in terms of percentage, than a decision two-to-one, but the lesser percentage *of one man* plays a greater part in the result. Therefore, we say,—the court

*en banc* idea will give no assurance for relieving this Court from necessity for considering cases. In a two-to-one decision, one man in dissent represents 33 1/3d per cent. In the four-to-three decision, the dissenters represent 42 6/7ths per cent. The one man whose views speak in terms of a majority opinion, represents 33 1/3d per cent in the first instance, 14 2/7ths per cent in the second.

There is more reason why this Court would deem Certiorari proper relative to one-man decisions in courts *en banc*, because *more judges* have evidenced the importance of the questions by the closeness of the vote, than if merely one-man dissents with two.

In fact, as one-man evidences greater importance as the size of a court *en banc* increases, a reference to this Court is more likely by the certification of questions, without resort to Certiorari.

So, we cannot perceive that a court *en banc* decision (where the vote is close) can serve any good purpose of benefit to this Court.

Where the decisions by a court *en banc* are unanimous or with one dissenter, nothing more is accomplished by a court *en banc* that could not equally be accomplished by a court of three-judges.

9. If any legal questions are deemed to be of importance sufficient to take judges from their other work for sitting as a court *en banc*, the questions should be of such importance as to require certification to this Court, by the free and voluntary action of a three-judges court. The Ninth Circuit solved the very same problem in that manner, in *Lang's Estate* v. *Commissioner*, 97 Fed. (2d) 867, (See, 304 U. S. 264 for the answers to the certified questions), and the judges of that circuit deemed that they had no authority, under the pertinent provisions of Statutes, to consider any case as a court *en banc*. The Ninth Circuit had greater reasons for consideration as a court *en banc*, because the decisions in that circuit would have stood in *direct conflict* by decision through a three-judges court; whereas, in the case

at bar *there were no conflicts in the Third Circuit* and, further, it is impossible to imagine any other case ever arising with relation to *the same facts* as are present in the case at bar (either in the Third Circuit or elsewhere). From the fact that this Court accepted and answered the questions in *Lang's Estate* v. *Commissioner*, instead of directing that the case be decided in that circuit by the court *en banc*, we find the only precedent of consideration of the matter, even indirectly.

10. The jurisdiction of the circuit court of appeals for review of Board decisions is covered by Section 1001, *et seq.*, of the Revenue Act of 1926 (Internal Revenue Code, Section 1141), which ends in part:

> "Such courts are authorized to adopt rules for the filing of the petition for review, the preparation of the record for review, *and the conduct of proceeding upon such review . . .*" (Italics added)

In the Reports of both Committees of Congress, during enactment of the Revenue Act of 1926, it was stated:

> "Court review—Rules of procedure.—The proceedings on review will be conducted in accordance with rules adopted by the several courts of review. The committee is convinced that *it is highly desirable that the rules be as uniform as possible.* In a desire not to impose a further burden upon the Supreme Court of the United States, the committee has decided to rely upon the possibility of *action by the conference of circuit judges* and upon recommendations submitted to the circuit courts of appeals by the board to secure this uniformity." (House Report No. 1, 69th Congress, 1st Session, page 20; Senate Report No. 52, 69th Congress, 1st Session, page 37.) (Italics added)

Obviously, there cannot be "uniformity" relative to taxpayers in various parts of our country, if courts are going to sit by three judges in one place, four in another, and so on up to seven in two of the circuits; nor, if a discretion rests with all the judges in any particular circuit as to

whether they will accord consideration by varying numbers of judges.

Further, the reports of the Conference of Judges evidence no recommendation for necessity as to any such change.

The opinion below argues that the "three judges" specified in the Judicial Code is meaningless. If *any* number of judges, down to a quorum of two judges, as the majority of judges in the various circuits may see fit to determine at times and from time to time, constitutes "the court", then *the judges* make "the court" instead of Congress, and Section 117 must be construed as being wholly meaningless. Congress "makes" the judges, but the judges make *the court.*

11. This case presents a most curious situation by way of paradox. For one purpose what Congress has declared, is disregarded; for another purpose Congress is construed as having said *something which it did not say*, but is "presumed" to have said by a silence.

12. The opinion below finds answer in the opinion of the Ninth Circuit in *Lang's Estate* v. *Commissioner, supra*:

> "Obviously if this were a three-judge court, when five specifically and all the district judges were competent to sit to constitute a 'full' court 'Which shall consist of three judges', it is not enlarged to a four-judge or five or more judge court because there are now more circuit judges competent to participate in its sessions.
>
> Any other interpretation of the legislation would lead to grave difficulties of administration. If, because there are four or six circuit judges in a circuit, a four or six-judge court were deemed created by Congress, then each judge may well have the right and the duty to demand his place in the hearing on each appeal. This would lead to the embarrassment of an evenly divided court. More important still, it would increase so greatly the amount of work of each individual judge that it would cause again the arrearages which the additional judges have been created to remove."

13. If all the circuit judges of a circuit can sit as "the court", it would seem to follow that all of the district judges within a circuit may sit as a "district court", or as many as the judges themselves may select. Yet, we find in Judicial Code, Section 266, as amended, provision for a three-judge court in terms of a combination as between one Circuit Justice or circuit judge, and two district or circuit judges, in specified situations. It appears that Congress holds a decided preference for three-judge courts.

14. The opinion below expresses concern regarding what may be "the circuit court of appeals" if it does not comprise all of the judges holding appointment to a particular circuit. That situation is no different from that of the *district* courts. (See, Judicial Code, Section 1, as amended.) Congress has provided for a number of "district courts" and for several judges to preside as the *same district court.* That, however, does not change the situation of a "district court" functioning by a *single district judge.* If courts *en banc* were proper for circuit courts of appeals, it equally could be argued that all of the district judges of any particular district court could sit *en banc*, regardless of the provision that they sit as single judges. Thus, not only would a lack of uniformity result but also, the very reason for additional district judges in congested district courts would find a frustration. It may be noted further, that Judicial Code, Section 118, gives a clear distinction between circuit judges and the circuit court, as follows:

> ". . . it shall be the duty of each circuit judge in each circuit to sit *as one of the judges* of the circuit court of appeals in that circuit from time to time according to law. . . ." (Italics added)

What is, "according to law", except by reference to the three-judge court mentioned in Section 117? The distinction would appear clear, that circuit judges are judges for their circuit, but that they participate as judges of the circuit court of appeals when the court functions *through three judges.*

15. The Constitution (Article III, Section 1) and Acts of Congress enacted pursuant thereto, have not vested the judicial power in circuit courts of appeals (as inferior courts) comprising a greater number than three judges. When five judges in the Third Circuit purported to hear and decide this case, various groupings of the five judges can find a conversion into *ten* circuit courts of appeals as purporting to exercise the judicial power relative to the case of this petitioner. Whereas by Internal Revenue Code, Section 1142 the review of Board decisions is confined to "a circuit court of appeals", a consideration by *ten* circuit courts of appeals finds no authority by statute.

The petitioner urges the foregoing objections as rendering the judgment by the court *en banc* invalid as being without any authority in law.

## CONCLUSION.

By the entry of the appropriate judgment, the decision of the Board of Tax Appeals should be affirmed, or the judgment of reversal by the court *en banc* should be set aside and the Circuit Court of Appeals for the Third Circuit should be ordered and directed to enter judgment for the petitioner herein affirming the decision of the Board of Tax Appeals, or, if this Honorable Court deems that the ends of justice so require, the case should be remanded to the Board of Tax Appeals for a rehearing.

Respectfully submitted,

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